

SUPERIOR COURT OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

**VERSUS
INTERNATIONAL BRIDGE COMPANY, PLAINTIFF,
ERROR.**

THE PEOPLE OF THE STATE OF NEW YORK,

(26,646)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 560.

INTERNATIONAL BRIDGE COMPANY, PLAINTIFF IN
ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

Original. Print

Remittitur from Court of Appeals.....	a	1
Record on appeal to Court of Appeals.....	e	2
Statement under rule 41.....	1	3
Notice of appeal.....	2	4
Summons	3	5
Complaint	4	6
Answer	10	12
Requests to find.....	24	26
Findings of fact.....	24	26
Conclusions of law.....	40	42
Exceptions.....	44	46
Decision, Rudd, J.....	49	51
Findings of fact.....	49	51
Conclusions of law.....	63	65
Judgment	66	68
Case and exceptions.....	67	69
Colloquy between court and counsel.....	67	69

	Original	Print
Testimony of H. Robinson Safford.....	75	77
Adelbert Moot	104	106
George A. Ricker.....	105	107
R. W. Lytle.....	123	125
Ralph A. Kellogg.....	132	134
Arvin J. Dillenbeck.....	158	160
Charles Taylor	170	172
H. Robinson Safford (recalled).....	172	174
Offers of exhibits, &c.....	176	178
Exhibit No. 9—Report of the decision of the Attorney General <i>vs.</i> The International Bridge Company, reported in 6 Ontario Appeals Reports, 537, received in evidence at fol. 278, printed at fol. 711.....	178	180
Stipulation as to case and exceptions.....	185	187
Stipulation, waiver of certification.....	186	188
Notice of appeal to Court of Appeals.....	188	190
Judgment of appellate division.....	189	191
Judgment	190	192
Affidavit of no opinion by appellate division.....	192	194
Stipulation and waiver of certification.....	193	195
Stipulation as to opinion of Court of Appeals.....	195	197
Opinion of Court of Appeals, McLaughlin, J.....	196	197
Exhibit 25—Blue-print, plan for rebuilding draw span, Erie Canal, &c.	204	203
49—Blue-print, Government map of 1899.....	205	203
A—Blue-print, twentieth district, St. Thomas Division, Ontario lines	206	203
B—Blue-print, map of Squaw Island.....	207	203
Writ of error.....	208	204
Bond on writ of error.....	211	205
Order allowing writ of error.....	215	207
Petition for writ of error.....	216	208
Assignment of errors.....	223	211
Citation	228	214
Order for judgment on remittitur.....	230	214
Judgment on remittitur.....	233	215
Certificate of lodgment.....	236	216
Clerk's certificate.....	238	217

Court of Appeals.

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, Held at Court of Appeals Hall, in the City of Albany, on the 12th day of March, in the Year of Our Lord One Thousand Nine Hundred and Eighteen, Before the Judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.
R. M. BARBER, Clerk.

Remittitur March 13, 1918.

b THE PEOPLE, &c., Respondent,

agst.

THE INTERNATIONAL BRIDGE CO., Appellant.

Be it remembered, That on the 31st day of October, in the year of our Lord one Thousand nine hundred and Seventeen The International Bridge Co., the appellant in this action, came here into the Court of Appeals, by Moot, Sprague, Brownell & Marcy, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The People, &c., the respondent in said action, afterward appeared in said Court of Appeals by Merton E. Lewis, Attorney-General.

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

c Whereupon, The said Court of Appeals having heard this cause argued by Mr. Adelbert Moot of counsel for the Appellant, and by Mr. James S. Y. Ivins of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from in this action, be in all things affirmed. And it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this Court.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

d Therefore, it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the Justices

thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,
*Clerk of the Court of Appeals
of the State of New York.*

Court of Appeals, Clerk's Office.

Albany, Mar. 13, 1918.

I hereby certify that the *preceding* record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal Court of Appeals, State of New York.]

R. M. BARBER, *Clerk.*

e

Volume 1.

Original.

STATE OF NEW YORK:

Court of Appeals.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff-Respondent,

vs.

INTERNATIONAL BRIDGE Co., Defendant-Appellant.

Record on Appeal.

Merton E. Lewis, Attorney-General, Attorney for Plaintiff-Respondent, Capitol, Albany, N. Y.

Moot, Sprague, Brownell & Marcy, Attorneys for Defendant-Appellant, 302 Erie Co. Bank Bldg., Buffalo, N. Y.

Filed Oct. 31, 1917.

Albany County, N. Y., Clerk's office. Filed Mar. 23, 1918.

STATE OF NEW YORK.

Court of Appeals

PEOPLE OF THE STATE OF
NEW YORK,

Plaintiff-Respondent,

vs.

INTERNATIONAL BRIDGE
COMPANY,

Defendant-Appellant.

2

STATEMENT UNDER RULE 41.

3

This action was commenced by the service of a summons and complaint on January 13, 1916.

Defendant's answer was duly served on January 19, 1916.

The names of the original parties to this action are the People of the State of New York, plaintiff, and International Bridge Company, defendant.

4

Hon. Merton E. Lewis, Attorney General for the State of New York, has succeeded Hon. Egbert E. Woodbury, former Attorney General, as attorney for the plaintiff.

Notice of Appeal.

- 5 Moot, Sprague, Brownell & Marey, are attorneys for the defendant.

There have been no changes in the parties to this action or their attorneys, other than that shown above.

6

NOTICE OF APPEAL.**SUPREME COURT—ALBANY COUNTY.**

PEOPLE OF THE STATE OF
NEW YORK,
vs.
INTERNATIONAL BRIDGE
COMPANY,

Plaintiff,
Defendant.

- 7 PLEASE TAKE NOTICE that the defendant, International Bridge Company, hereby appeals to the Appellate Division of the Supreme Court,
8 Third Department, from the judgment of the Supreme Court, entered herein in Albany County Clerk's office on the 20th day of November, 1916, in favor of the plaintiff and against the defendant, for the sum of \$525.66 and \$218.76 costs, and

Summons.

defendant appeals from each and every part of 9
said judgment.

Dated, November 27, 1916.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant,
Office and Post Office Address,
302 Erie County Bank Bldg., 20
Buffalo, N. Y.

To

Hon. Egbert E. Woodbury,
Attorney-General.
Clerk of the County of Albany.

SUMMONS.

11

SUPREME COURT—COUNTY OF ALBANY.

PEOPLE OF THE STATE OF	{
NEW YORK.	
<i>Plaintiffs,</i>	
vs.	{
INTERNATIONAL BRIDGE	
COMPANY.	
<i>Defendant.</i>	

12

To the above named defendant:

YOU ARE HEREBY SUMMONED to answer
the complaint in this action, and to serve a copy
of your answer on the plaintiff's attorney within
twenty days after the service of this summons, ex-

Complaint.

- 13 clusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Albany.

Dated, January 11, 1916.

14

E. E. WOODBURY,
Attorney-General, Plaintiffs' Attorney,
Office and Post Office Address,
Capitol, Albany, N. Y.

15

SUPREME COURT—ALBANY COUNTY.

PEOPLE OF THE STATE OF
NEW YORK,

Plaintiffs,

vs.

16 INTERNATIONAL BRIDGE
COMPANY,

Defendant.

The complaint of the People of the State of New York, by Egbert E. Woodbury, their Attorney-General, alleges upon information and belief the following facts constituting their cause of action:

Complaint.

That the defendant is a domestic corporation, organized under and pursuant to the provisions of Chapter 753 of the Laws of 1857, under the corporate name of International Bridge Company, and that in and by such act the said defendant was authorized and empowered to construct, maintain and manage a bridge across the Niagara river from the City of Buffalo to some point near Fort Erie in Canada, so as not materially to impede the navigation of said river, said bridge to be constructed with two draws, one across Black Rock Harbor and the other across the main channel of the river; and in and by Sections 15 and 16 of said act the said company was given authority to construct such bridge for the passage of persons on foot and in carriages and otherwise, as for passage of railroad trains and provided for the erection of toll gates and the rates of tolls that could be charged for the passage over such bridge of pedestrians, animals and horse-drawn vehicles, whenever the said bridge should be completed for the passage of ordinary teams and carriages.

That in the same year, 1857, a similar corporation was created under the laws of the Dominion of Canada for the construction, maintenance, working and managing of a bridge across the Niagara river from some point at or near the Village of Waterloo, (known as Fort Erie), in the township of Bertie, to the City of Buffalo, and further provided that the bridge should be constructed, "as well for the passage of persons on foot and in carriages and otherwise as for the passage of railway trains and such railway companies as are

Complaint.

- 21 hereinafter mentioned or referred to shall have and be entitled to the same and equal rights and privileges in the passage of the said bridge and in the use of the machinery and fixtures thereof and of all the approaches thereto."

Both charters made provisions empowering railroads to loan their credit to the bridge companies or to subscribe to the stock thereof, and municipal corporations beneficially affected by the bridge were also permitted to subscribe to the stock under the Canadian Act.

- 22 Chapter 753 of the Laws of 1857 was amended by Chapter 135 of the Laws of 1858, and by Chapter 294 of the Laws of 1858 and by the latter act the City of Buffalo was authorized and empowered to guarantee the payment of interest on moneys expended in the construction of the bridge and to raise the funds necessary for the payment thereof, but the bridge was not completed for several years thereafter and no money was raised by the city for such purpose.

- 23 Chapter 753, Laws of 1857, was further amended by Chapter 54, Laws of 1862, Chapter 225, Laws of 1867, Chapter 550, Laws of 1869, Chapter 390, Laws of 1871, and Chapter 332, Laws of 1898.

Chapter 550 of the Laws of 1869, provided for consolidation of the said International Bridge Company with any other bridge company or corporation theretofore, or which might be thereaf-

Complaint.

ter incorporated under the laws of the Dominion 25
of Canada for a similar purpose and to enter into
all required contracts and agreements therewith,
and after making full provision for the union and
consolidation of said bridge companies for the pur-
pose of creating and maintaining a bridge across
the Niagara river at or near the Village of Fort
Erie in the County of Welland, to the City of Buf-
falo, Section 6 of said act provided as follows: 26

"Section 6. Upon the making and perfect-
ing of said agreement and act of consolidation
as provided in the preceding section, and
filing said agreement as in said section pro-
vided, the several corporations, parties there-
to, shall be deemed and taken to be consolidat-
ed, and to form one corporation by the name
in said agreement provided, possessing all
the rights, privileges and franchises, and sub-
ject to all disabilities and duties of each of
such corporations so consolidated, except as
herein provided."

27

That pursuant to the aforesaid act and a similar
act passed by the Canadian Parliament, the con-
solidation was perfected shortly thereafter and
the bridge was soon thereafter fully constructed
and has been maintained solely as a railroad
bridge, and no passageway for people on foot or
for animals or vehicles has ever been constructed
or placed upon said bridge. 28

That by Chapter 666 of the Laws of 1915, a new
section was added to Chapter 753 of the Laws of
1857, numbered 15-a, which provided that a road-

Complaint.

29 way for vehicles and a pathway for pedestrians should be constructed upon the draw across Black Rock Harbor, upon the bridge owned by this defendant giving a passageway over said draw between Squaw Island and the mainland of New York State, such roadway and footpath to be completed and ready for use by January 1, 1916, and in case of the failure of the above named International Bridge Company or its successor in interest
30 so to complete the same on or before said last mentioned date, the said company should be liable to a penalty of fifty dollars per day for each day that it should remain in default, and provided that such penalties should be sued for and collected by the Attorney-General in any court of competent jurisdiction. The Act further provided for the erection of toll gates and rates of tolls which could be charged for the use of such roadway and pathway, which act became a law and took effect on the
31 22nd day of May, 1915.

The plaintiffs hereby refer to said several acts hereinbefore stated and make the same a part of this complaint

32 The plaintiffs further show that the said defendant, the International Bridge Company, has wholly failed and neglected to construct or place upon said bridge across Black Rock Harbor, a roadway for vehicles or a pathway for pedestrians as required by said Chapter 666 of the Laws of 1915, and made default in the construction of such roadway and pathway as required by said Act on each of the days of January 1st to January 10, 1916,

Complaint.

inclusive, a period of ten days, and the said defendant, contrary to and in violation of the provisions of said Chapter 666 of the Laws of 1915, during the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th days of January, 1916, inclusive, failed, refused and neglected to construct such roadway or pathway upon said bridge, and thereby the said defendant incurred and became liable for a penalty of fifty dollars for each and every day above specified, amounting in all to the sum of five hundred dollars.

That by reason of the aforesaid facts the plaintiff is entitled to recover of and from the said defendant the aforesaid sum of five hundred dollars in penalties, on account of the said defendant's default in constructing the roadway and pathway aforesaid.

WHEREFORE, the plaintiffs demand judgment against the said defendant for the sum of five hundred dollars (\$500) with interest thereon from January 10, 1916, together with the costs of this action.

E. E. WOODBURY,
Attorney-General, Attorney for Plaintiffs,
 Office and Post Office Address,
 Capitol, Albany, N. Y.

State of New York,)
 County of Albany. (ss.)

EGBURT E. WOODBURY, being duly sworn,
 deposes and says that he is the Attorney-General

Answer.

37 of the State of New York, and Attorney for the plaintiffs herein, and is one of the plaintiffs; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

38

E. E. WOODBURY.

Subscribed and sworn to before me,
this 12th day of January, 1916.

W. M. Thomas,
Notary Public.

39

ANSWER.

SUPREME COURT—ALBANY COUNTY.

PEOPLE OF THE STATE OF NEW YORK,	<i>Plaintiff,</i> <i>against</i> <i>Defendant.</i>
INTERNATIONAL BRIDGE COMPANY,	

40

Now comes the defendant, International Bridge Company, by Moot, Sprague, Brownell & Marey, its attorneys, and for its answer to the complaint herein alleges:

Answer.

FIRST: Admit and alleges the incorporation 41
of this defendant under and by virtue of Chapter
753 of the Laws of 1857, and of a similar corpora-
tion under the laws of Canada, to wit: Chapter
227 of 20th Victoria, as alleged in said complaint,
and that each of said corporations possessed, by
virtue of the act of its incorporation, the powers
set forth in said complaint; and defendant admits
that said corporations were consolidated, pur-
suant to an act of the Legislature of the State of
New York, being Chapter 550 of the Laws of
1869, and an act of the Canadian Parliament,
being Chapter 65 of the 32nd and 33rd Victoria,
as alleged in said complaint. 42

SECOND: Defendant further alleges that
after the passage of said Act of Legislature of
the State of New York and of the Parliament of
Canada, authorizing the consolidation of said cor-
porations, and prior to the commencement of the
construction of said bridge, an act was duly pass-
ed by the Congress of the United States on June
30, 1870, entitled Chapter 176 of the Acts of 1870,
which provided that any bridge and its appur-
tenances which should be constructed across the
Niagara River from the City of Buffalo, New
York, to Canada, in pursuance of the provisions
of said Act of the New York Legislature incor-
porating said International Bridge Company, or
of any acts of said Legislature then in force
amending the same, should be lawful structures,
and said Act of Congress authorized the same to
be constructed and maintained as provided by 43
44

Answer.

- 45 said Act of the New York Legislature and such amendments thereto, anything in any law or laws of the United States to the contrary notwithstanding, and said Act of Congress further declared such bridge to be an established post route for the mails of the United States, and provided that the location of such bridge should be subject to the approval of the Secretary of War, but not to be located south of Squaw Island, and further provided that such bridge should have at least two draws or not less than 160 feet in width in clear between the piers, which should be located at the points best calculated to accommodate the commerce of said river, and that the piers of said bridge should be parallel to the current of said river and that said bridge should be subject in its construction to the supervision of the Secretary
- 46 of War of the United States, to whom the plans and specifications relative to its construction should be submitted for approval, and that all railway companies desiring to use said bridge should have and be entitled to equal rights and privileges in the passage of the same, and in the use of the machinery and fixtures thereof and of all the approaches thereto, upon such terms and
- 47 conditions as should be prescribed by the District Court of the United States for the Northern District of New York, upon hearing the allegations and proofs of the parties, in case they should not agree, and said Act of Congress further provided that the right to alter or amend said Act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of said bridge was thereby expressly reserved.

Answer.

THIRD: That thereafter and in or about the years 1870 to 1874 said bridge was constructed by the defendant with two draws, one across Black Rock Harbor and the other across the main channel of the River, as provided by said Act of the Legislature of the State of New York incorporating said Bridge Company, and authorized by said Act of Congress, but said bridge was constructed as a railroad bridge, exclusively, without any provision for footpaths or roadways thereon. 49
50

FOURTH: That after the completion of said bridge an act was passed by the Congress of the United States, approved on the 23rd day of June, 1874, entitled Chapter 475 of the Acts of 1874, approving the modification in the plans of said bridge, and declaring said bridge as constructed to be a lawful structure, and an established post route for the mail of the United States. 51

FIFTH: That in or about the year 1881, an information was filed by the Attorney General of the Province of Ontario, seeking to restrain the use of said bridge by railways until the same should be put into condition for ordinary traffic, or in the alternative, for the removal of said bridge as a nuisance, or to compel permission of its use by foot passengers on payment of the statutory tolls; that said proceeding was prosecuted to the Court of Appeal for said Province of Ontario, and it was held and determined by said Court of Appeal that said provision in the 52

Answer.

- 53 special act incorporating said corporation under the laws of Canada, to wit; Caption 227 of 20th Victoria, providing "that the said bridge shall be as well for the passage of persons on foot and otherwise as for the passage of railway trains," was permissive, and not mandatory, and imposed upon said corporation no obligation to construct footpaths or roadways across its bridge, for the accommodation of person on foot, or in carriages, or otherwise, and that specific performance of said provision would not be enforced.
- 54

- SIXTH: That thereafter and in or about the years 1899 to 1901, said bridge was re-built by the defendant and in connection therewith, plans for the re-building of said bridge were submitted to and approved by the Secretary of War of the United States, on or about the 29th day of March, 1899, as required by the Acts of Congress in such case made and provided; That the written approval of said plans by said Secretary of War contained the following provision:
- 55

- "That if the Secretary of War shall hereafter deem it necessary or advisable that the portion of the bridge over Black Rock Harbor shall be remodeled or changed in any manner, such change shall be made by the owners of the bridge, or their assigns, at their own expense."
- 56

- SEVENTH: That said plans so approved by the said Secretary of War showed wings to be constructed on either side of said proposed new bridge, for the accommodation of roadways and footpaths, but that in the building of said bridge,

Answer.

said defendant omitted the construction of said wings and made no provision for roadways and footpaths upon said new bridge, because defendant was advised by its engineers that said wings would impose an excessive and dangerous strain upon the piers of said bridge; That said bridge was re-built under the supervision of the resident representative at Buffalo of the Secretary of War and said modification in said plans approved by the Secretary of War was duly reported by said representative to said Secretary of War and said Secretary of War acquiesced in and assented to said modification.

58

EIGHTH: That the Congress of the United States, in and by the Rivers and Harbors Act, approved June 13, 1902, provided that the Secretary of War and Chief of Engineers of the Army should make an investigation of Black Rock Harbor, with a view of obtaining a suitable channel for deep water craft around the rocks and shoals at the head of Niagara River and in compliance with said Act, the Secretary of War on or about January 13, 1904, transmitted to the House of Representatives certain reports of a preliminary examination and survey of said Black Rock Harbor. That thereafter, the Congress of the United States, by the Rivers and Harbors Act approved March 3, 1905, made an appropriation for the improvement of Black Rock Harbor, in accordance with said report, and plans and specifications were thereupon prepared to carry out said improvement, and Congress

59

60

Answer.

- 61 thereafter, in the Rivers and Harbors Acts of subsequent years, made further appropriations for the carrying out of said improvements; That it was a part of the project for the improvement of said Black Rock Harbor, that the United States should acquire all of the right and title of the State of New York, if any, to the lands and waterways necessary to said improvement, including that portion of the Erie Canal adjacent to Black Rock Harbor, and the lands under the waters of Black Rock Harbor, and the United States required a conveyance thereof from the State of New York as a condition of making said improvement.
- 62

- NINTH: That thereafter, by Chapter 373 of the Laws of 1904, the Legislature of the State of New York authorized the Land Board to convey to the United States such lands then owned by the State under the waters of the Niagara River, or in the vicinity of said River in the City of Buffalo, including such lands as were then used for canal purposes in said City, and as might be deemed abandoned by the Canal Board, as might be required by the United States in the construction of said Ship Canal. That thereafter, and on or about the 28th day of June, 1905, the Canal Board of the State of New York duly passed a resolution abandoning the portion of the Erie Canal adjacent to Black Rock Harbor and all of the lands under water of Black Rock Harbor, at and adjacent to the place where the same is crossed by the bridge of this defendant, upon con-
- 63
- 64

Answer.

dition that the United States should do the work referred to and provided for in said Act of Congress, and a like resolution was duly passed by the Commissioners of the Land Office of the State of New York; and thereafter, and on or about the 25th day of July, 1905, pursuant to said resolutions and in accordance with said Chapter 373 of the Laws of 1904, the State of New York duly conveyed to the United States, by a deed dated on that day and recorded in Erie County Clerk's office on the 11th day of January, 1906, in Liber 1018 of Deeds at page 315, all the right, title and interest of the State of New York in and to said lands and waterways, including the portion of the Erie Canal and towpath adjacent to the Black Rock Harbor and the lands under the water of the Black Rock Harbor, and said lands and waters have ever since been under the exclusive jurisdiction and control of the United States, which has exercised undisputed authority over them, in connection with the improvement of Black Rock Harbor, which was commenced shortly thereafter by the United States and has since been completed.

TENTH: That thereafter and in or about the year 1907, the Secretary of War served a notice, dated April 2, 1907, upon said defendant, stating that said Secretary of War had good reason to believe that said bridge over Black Rock Harbor and Erie Canal, being a part of the International Bridge, was an unreasonable obstruction to the free navigation of Black Rock Harbor and

Answer.

69 channel as projected, and requiring the defendant to remove the existing pivot pier and side span and to construct a bridge in accordance with requirements of the Secretary of War specified in said notice.

ELEVENTH: That pursuant to the requirements of said notice the defendant submitted plans to the Secretary of War for the re-building of that portion of its bridge over Black Rock Harbor; that said plans showed wings on each side of said proposed bridge for the purpose of accommodating roadways and footpaths, but said wings were shown in dotted lines and were stated upon said plans to be "for future roadway" and there was a notation upon said plans as follows: "Roadways shown in dotted lines not to be put in at present, but provision is made in the design of the bridge for their future construction;" that said plans, containing said notation, were duly approved by the Secretary of War of the United States and said bridge was thereafter built by the defendant over said Black Rock Harbor, but the said wings were not constructed by the defendant and no provision was made upon said bridge for roadways and footpaths.

72

TWELFTH: That said bridge was constructed under the supervision of the resident representative of the Secretary of War and after the completion thereof, said representative duly reported to the Secretary of War the completion of said bridge, in accordance with the approved plans for its construction.

Answer.

THIRTEENTH: Defendant admits that the Legislature of the State of New York, by the passage of an alleged act designated as Chapter 666 of the Laws of 1915, attempted to amend Chapter 753 of the Laws of 1857, being the special act incorporating this defendant, by adding a new section thereto, numbered 15-a, containing the provisions alleged in the complaint, and further admits that defendant has failed and neglected to construct or place upon said bridge, across Black Rock Harbor, a roadway for vehicles or a pathway for pedestrians, as required by said alleged act of the Legislature, and admits that defendant failed, refused and neglected to construct such roadway or pathway during the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, and 10th days of January, 1916, but denies that thereby the defendant incurred and became liable for a penalty of fifty dollars (\$50.00) for each and every of such days or for any penalty whatever.

FOURTEENTH: For a further and separate defense to the alleged cause of action set forth in said complaint, defendant repeats and alleges all of the matters hereinbefore admitted and alleged and further alleges that said so-called Act of the Legislature of the State of New York, to wit: Chapter 666 of the Laws of 1915, was and is null and void, and of no force and effect, because the same impairs the obligation of contracts, to wit: the franchises granted to this defendant by the Legislature of the State of New York and by the Parliament of Canada in the acts of its incorporation, and attempts to impose upon defendant burdens not imposed as condi-

73

74

75

76

Answer.

77 tions of said franchises when the same were granted, to wit: the obligation to maintain a footpath and roadway across the Black Rock Harbor draw of its bridge, and to maintain a bridge and give a passageway from the City of Buffalo to Squaw Island, in contravention of Article 1, Section 10, Subdivision 1 of the Constitution of the United States; and said act deprives defendant of its
 78 property, without due process of law, in contravention of the first section of the 14th amendment to the Constitution of the United States, and of Article 1, Section 6 of the Constitution of the State of New York.

FIFTEENTH: For a second further and separate defense to the alleged cause of action set forth in said complaint, defendant repeats
 79 and alleges all of the matters hereinbefore admitted and alleged, and further alleges that said so-called Act of Legislature of the State of New York, to wit: Chapter 666 of the Laws of 1915, was and is null and void and of no force and effect, because the tolls fixed thereby for the use of said roadway and pathway are so low and inadequate that the same will not yield defendant
 , 80 a fair return upon the investment required by said act to be made in the construction and maintenance of said roadway, and pathway, and will be confiscatory, and said act purports to provide that no charge shall be made by this defendant for the use thereof for empty wagons or automobile trucks used for commercial purposes, or for the drivers thereof, thereby depriving this defendant of its property without due process of

Answer.

law, in contravention of the first section of the 81
14th amendment of the Constitution of the United
States, and of Article One, Section 6 of the Con-
stitution of the State of New York.

SIXTEENTH: For a third further and sepa-
rate defense to the alleged cause of action set
forth in said complaint, defendant repeats and al-
leges all of the matters hereinbefore admitted or
alleged, and further alleges that the Niagara river 82
is a navigable water of the United States,
forming the international boundary between the
United States and the Dominion of Canada, a de-
pendency of the British Empire, and that Black
Rock Harbor is the name of that part of said
Niagara river which passes between the main-
land of the United States and Squaw Island in
the said river, that all of the commerce passing 83
over the said bridge of the defendant across said
Niagara river is either interstate commerce or
foreign commerce between the United States and
foreign nations, and that defendant's said bridge
is an instrumentality of such interstate and for-
eign commerce, that by the special acts herein-
before specified affecting the said bridge of the 84
defendant and also by the general acts relating
to the construction of bridges over navigable
waters of the United States and requiring that
the plans for such bridges be approved by the
Secretary of War and by said Rivers and Harbors
Acts hereinbefore alleged, providing for the im-
provement of Black Rock Harbor, and by the
duly authorized acts of the Secretary of War ap-
proving the plans for the construction and re-
construction of defendant's said bridge and re-

Answer.

- 85 quiring the re-construction of the draw of such bridge across Black Rock Harbor, and approving plans for the same as hereinabove alleged, and by requiring the cession and conveyance by the State of New York of all of its right, title and interest in and to the lands under the waters of Black Rock Harbor and of that portion of the Erie Canal adjacent thereto, the Congress of the United States has assumed and exercised exclusive jurisdiction over the bridge of the defendant, including said draw over Black Rock Harbor, and has assumed and exercised exclusive jurisdiction over said Black Rock Harbor, including that portion thereof which was formerly a part of the Erie Canal, under and by virtue of Article 1, Section 8, Subdivision 3 of the Constitution of the United States, providing that Congress shall
- 86 have power to regulate commerce with foreign nations and among the several states, and that the said attempted act of the Legislature of the State of New York, to wit: Chapter 666 of the Laws of 1915, is null and void, and of no force and effect, because it is in contravention of said Article 1, Section 8, Subdivision 3 of the Constitution of the United States, and of the Acts of Congress heretofore mentioned, passed under and by virtue of the power so conferred upon Congress by the Constitution of the United States, and said so-called Act of the Legislature of the State of New York is an attempted interference with and regulation of foreign and interstate commerce, and is an attempt to interfere with, regulate and impose additional burdens upon the bridge of defendant over waters of the

Answer.

United States forming an international boundary, over which Congress has assumed and exercises exclusive jurisdiction, in contravention of said provision of the Constitution of the United States. 89

WHEREFORE, defendant demands that the complaint herein be dismissed, with costs to this defendant.

MOOT, SPRAGUE, BROWNELL & MARCY, 90
Attorneys for Defendant,
 Office and Postoffice Address,
 302 Erie County Bank Building,
 Buffalo, New York.

State of New York, }
 County of Erie. } ss.:

91

HENRY WARE SPRAGUE, being duly sworn, deposes and says that he is a director of the defendant, International Bridge Company, in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. 92

(Signed) HENRY W. SPRAGUE.

Subscribed and sworn to before
 me this 19th day of January, 1916.

(Signed)

Frances Scheffer,
 Notary Public,
 in and for Erie County, New York.

26

REQUESTS TO FIND.

93 SUPREME COURT—ALBANY COUNTY.

PEOPLE OF THE STATE OF NEW YORK, against INTERNATIONAL BRIDGE COMPANY,	<i>Plaintiff,</i> <i>Defendant.</i>
--	--

94

The defendant submits the annexed proposed findings of fact which it deems established by the evidence herein, and proposed conclusions of law, which it desires and requests be made.

95

Dated, Buffalo, N. Y., July 7, 1916.
 MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant,
 Office and Postoffice Address,
 392 Erie County Bank Building,
 Buffalo, N. Y.

96

FINDINGS OF FACT.

I.

Found, W. P. R.

That the defendant is a consolidated corporation, formed by the consolidation of a corporation organized under and by virtue of a special Act of the Legislature of the State of New York.

Requests to Find.

to wit: Chapter 753 of the Laws of 1857, and 97
 - Acts amendatory thereof and supplementary thereto, for the purpose of constructing a bridge across the Niagara River from the City of Buffalo, New York, to some point near Fort Erie in Canada, and a corporation of the same name organized for similar purposes under and by virtue of a special act of the Legislative Council and Assembly of Canada, to wit: Chapter 227 of 20th Victoria. That said New York corporation and said Canadian corporation were duly consolidated in or about the year 1870, pursuant to authority granted by the Legislature of the State of New York, by Chapter 550 of the Laws of 1869, passed on the 4th day of May, 1869, and pursuant to authority granted by the Parliament of Canada by an act passed on or about the 22nd day of June, 1869, to wit: Chapter 65 of 32nd and 33rd Victoria: That said consolidated corporation has its principal office within the United States in the City of Buffalo, New York.

98

99

II.

Found, W. P. R.

That in and by said Act of the Legislature of the State of New York (Chapter 550, Laws of 1869) authorizing the consolidation of said New York corporation and said Canadian corporation, it was provided, among other things as follows:

100

"Section 6. Upon the making and perfecting of said agreement and act of consolidation as provided in the preceding section and filing said agreement as in said section provided, the several corporations, parties thereto, shall be deemed and taken to be con-

Requests to Find.

- 101 solidated, and to form corporation by the name in said agreement provided, possessing all the rights, privileges and franchises, and subject to all the disabilities and duties of each of such corporations so consolidated, except as herein provided; but nothing in this act contained shall be construed as in any manner impairing any liability against the corporation in the title of this act mentioned, but such liability shall continue against the consolidated corporation contemplated by this act."
- 102

III.

Found, W. P. R.

- That in and by Chapter 753 of the Laws of 1857, incorporating said New York corporation, it was provided that said bridge should be constructed with two draws one across Black Rock Harbor and the other across the main channel of the river, and it was further provided, among other things, as follows:
- 103

"Section 15. Said bridge may be constructed as well for the passage of persons on foot and in carriages and otherwise, as for the passage of railroad trains."

- 104 That the sixteenth section of said act provided for the erection of toll gates upon the completion of said bridge for the passage of ordinary teams and carriages, and authorized the directors to fix rates of toll not greater than the amounts specified in said section,

Requests to Find.

IV.

105

Found, W. P. R.

That in and by Chapter 227 of 20th Victoria, incorporating said Canadian corporation, it was provided, among other things, as follows:

"XIV. The said bridge shall be as well for the passage of persons on foot and in carriages and otherwise, as for the passage of railway trains."

106

V.

Found, W. P. R.

That the Congress of the United States, by an act approved June 30, 1870, entitled Chapter 176 of the Acts of 1870, provided that any bridge and its appurtenances which should be constructed across the Niagara River from the City of Buffalo, New York, to Canada, in pursuance of the provisions of said Act of the New York Legislature incorporating said International Bridge Company, or of any acts of said Legislature then in force amending the same, should be lawful structures, and said Act of Congress authorized the same to be constructed and maintained as provided by said Act of the New York Legislature and such amendments thereto, anything in any law or laws of the United States to the contrary notwithstanding, and said Act of Congress further declared said bridge to be an established post route for the mails of the United States, and provided that the location of said bridge should be subject to the approval of the Secretary of War, but not to be located south of Squaw Island, and

107

108

Requests to Find,

- 109 further provided that such bridge should have at least two draws of not less than 160 feet in width in clear between the piers, which should be located at the points best calculated to accommodate the commerce of said river, and that the piers of said bridge should be parallel to the current of said river and that said bridge should be subject in its construction to the supervision of the Secretary of War of the United States, to whom the plans and specifications relative to its construction should be submitted for approval, and that all railway companies desiring to use said bridge should have and be entitled to equal rights and privileges in the passage of the same and in the use of the machinery and fixtures thereof and of all the approaches thereto, upon such terms and conditions as should be prescribed by
- 110 the District Court of the United States for the Northern District of New York, upon hearing the allegations and proofs of the parties in case they should not agree, and said Act of Congress further provided that the right to alter or amend said Act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of said bridge was thereby expressly reserved.
- 111
- 112

VI.

Found, W. P. R.

That thereafter and in or about the years 1870 to 1847, said bridge was constructed by the defendant with two draws, one across Black Rock

Requests to Find.

Harbor and the other across the main channel of
the river, as provided by said Act of the Legis-
lature of the State of New York incorporating
said bridge company, and said bridge was built
across Squaw Island on a trestle which after-
wards was filled so as to present the appearance
of a solid embankment, but said bridge was con-
structed as a railroad bridge, exclusively, without
any provision for footpaths or roadways thereon.

113

114

VII.**Found, W. P. R.**

That after the completion of said bridge an act
was passed by the Congress of the United States
and approved on the 23rd day of June, 1874, en-
titled Chapter 475 of the Acts of 1874, approving
the modification in the plans of said bridge, and
declaring said bridge, as constructed, to be a law-
ful structure, and an established post route for
the mail of the United States.

115

VIII.**Refused, W. P. R.**

That in or about the year 1881, an information
was filed by the Attorney-General of the Prov-
ince of Ontario, seeking to restrain the use of said
bridge by railways until the same should be put
into condition for ordinary tra^c, or in the al-
ternative, for the removal of said bridge as a
nuisance, or to compel permission of its use by
foot passengers on payment of the statutory
tolls; that said proceeding was prosecuted to the

116

Requests to Find.

- 117 Court of Appeals for said Province of Ontario, and it was held and determined by said Court of Appeal that said provision in the special act incorporating said corporation under the laws of Canada, to wit: Caption 227 of 20th Victoria, providing "that the said bridge shall be as well for "the passage of persons on foot and otherwise as "for the passage of railway trains" was permissive, and not mandatory, and imposed upon said corporation no obligation to construct footpaths or roadways across its bridge, for the accommodation of persons on foot, or in carriages, or otherwise, and that specific performance of said provision would not be enforced.
- 118

119 Found, W. P. R.

- That thereafter and in or about the years 1899-1901, said bridge was rebuilt by the defendant, and in connection therewith plans for the re-building of said bridge were submitted to and approved by the Secretary of War of the United States, on or about the 29th day of March, 1899, as required by Act of Congress in such case made and provided: That the written approval of said plans by said Secretary of War contained the following provision:
- 120

"That if the Secretary of War shall hereafter deem it necessary or advisable that the portion of the bridge over Black Rock Harbor shall be remodeled or changed in any manner, such change shall be made by the owners of the bridge, or their assigns, at their own expense."

Requests to Find.

X.

121

Found, W. P. R.

That said plans, so approved by said Secretary of War, showed wings to be constructed on either side of said proposed new bridge, for the accommodation of roadways and footpaths, but that in the building of said new bridge said defendant deviated from said plans so approved by the Secretary of War, in that it omitted entirely the construction of said wings, and made no provision for roadways or footpaths upon said new bridge; That said bridge was rebuilt under the supervision of the resident representative at Buffalo of the Secretary of War, and said modification in said plans approved by the Secretary of War was duly reported by said representative to said Secretary of War and said Secretary of War acquiesced in and assented to said modification.

122

123

XI.

Found, W. P. R.

That the Congress of the United States, in and by the Rivers and Harbors Act, approved June 13, 1902, provided that the Secretary of War and Chief of Engineers of the Army should make an investigation of Black Rock Harbor, with a view of obtaining a suitable channel for deep water craft around the rocks and shoals at the head of Niagara River and in compliance with said Act, the secretary of war on or about January 13, 1904, transmitted to the House of Representa-

124

Requests to Find.

- 125 tives certain reports of a preliminary examination and survey of said Black Rock Harbor; That thereafter, the Congress of the United States, by the Rivers and Harbors Act approved March 3, 1905, made an appropriation for the improvement of Black Rock Harbor, in accordance with said report, and plans and specifications were thereupon prepared to carry out said improvement; and Congress thereafter, in the Rivers and Harbors Acts of subsequent years, made further appropriations for the carrying out of said improvement; that it was a part of the project for the improvement of said Black Rock Harbor, that the United States should acquire all of the right and title of the State of New York, if any, to the lands and waterways necessary to said improvement, including that portion of the Erie Canal adjacent to Black Rock Harbor, and the lands under the waters of Black Rock Harbor, and the United States required a conveyance thereof from the State of New York as a condition of making said improvement.
- 126
- 127

XII.

- 128 Found, W. P. R.
That thereafter, by Chapter 373 of the laws of 1904, the Legislature of the State of New York authorized the Land Board to convey to the United States such lands then owned by the state under the waters of the Niagara River, or in the vicinity of said river in the City of Buffalo, including such lands as were then used for canal

Requests to Find.

purposes in said city, and as might be deemed 129
 abandoned by the Canal Board, as might be re-
 quired by the United States in the construction of
 said Ship Canal. That thereafter, and on the
 28th day of June, 1905, the Canal Board of the
 State of New York duly passed a resolution
 abandoning the portion of the Erie Canal adja-
 cent to Black Rock Harbor and all of the lands
 under water of Black Rock Harbor, at and adja-
 cent to the place where the same is crossed by
 the bridge of this defendant, upon condition that
 the United States should do the work referred to
 and provided for in said Act of Congress, and a
 like resolution was duly passed by the Commiss-
 ioners of the Land Office of the State of New
 York; and thereafter, and on or about the 25th
 day of July, 1905, pursuant to said resolutions
 and in accordance with said Chapter 373 of the
 Laws of 1904, the State of New York duly con-
 veyed to the United States, by a deed dated on
 that day and recorded in Erie County Clerk's
 office on the 11th day of January, 1906, in Liber
 1018 of Deeds at page 315, all the right, title and
 interest of the State of New York in and to said
 lands and waterways, including the portion of the
 Erie Canal and tow-path adjacent to the Black
 Rock Harbor and the lands under the water of the
 Black Rock Harbor, and said lands and waters
 have ever since been under the exclusive jurisdi-
 ction and control of the United States, which has
 exercised undisputed authority over them, in con-
 nection with the improvement of Black Rock Har-
 bor, which was commenced shortly thereafter by

130

131

132

Requests to Find.

- 133 the United States and has since been completed. That said lands include the lands crossed by the Black Rock Harbor span of defendant's bridge.

XIII.

Found, W. P. R.

- 134 That thereafter and in or about the year 1907, the Secretary of War served a notice, dated April 2, 1907, upon said defendant, stating that said Secretary of War had good reason to believe that said bridge over Black Rock Harbor and Erie Canal, being a part of the International Bridge, was an unreasonable obstruction to the free navigation of Black Rock Harbor and channel as projected, and requiring the defendant to remove the existing pivot pier and side span and to construct a bridge, in accordance with the requirements of the Secretary of War specified in said notice.
- 135

XIV.

Found, W. P. R.

- 136 That pursuant to the requirements of said notice, the defendant submitted plans to the Secretary of War for the rebuilding of that portion of its bridge over Black Rock Harbor; that said plans showed wings on each side of said proposed bridge for the purpose of accommodating roadways and footpaths but said wings were shown in dotted lines and were stated upon said plans to be "for future roadway" and there was a nota-

Requests to Find.

tion upon said plans as follows: "Roadways 137 shown in dotted lines not to be put in at present, but provision is made in the design of the bridge for their future construction;" That said plans, containing said notation, were duly approved by the Secretary of War of the United States and said bridge was thereafter built by the defendant over said Black Rock Harbor, but the said wings were not constructed by the defendant and no provision was made upon said bridge for roadways and footpaths. 138

XV.

Found, W. P. R.

That said bridge was constructed under the supervision of the resident representative of the Secretary of War and after the completion thereof, and on or about the 6th day of December, 1915, said representative duly reported to the Secretary of War the completion of said bridge, in accordance with the approved plans for its construction. 139

XVI.

Found, W. P. R.

That thereafter the Legislature of the State of New York, by Chapter 666 of the Laws of 1915, amended Chapter 753 of the Laws of 1857, incorporating said International Bridge Company, by adding thereto a new section after Section 15, to be known as Section 15 A, and to read as follows:

Requests to Find.

- 141 "15-a. A roadway for vehicles and a pathway for pedestrians shall be constructed upon the draw across Black Rock Harbor giving a passageway over said draw between Squaw Island and the mainland of New York State, such roadway and footpath to be completed and ready for use by January first, nineteen hundred and sixteen, and in case of the failure of said corporation or its successor in interest so to complete the same on or before said date, said corporation, or its successor in interest, shall be liable to a penalty of fifty dollars per day for each day that it shall be in default. Such penalty may be sued for and collected by the attorney-general in any court of competent jurisdiction.
- 142 Upon the completion of said roadway and pathway, said company may erect toll gates and fix rates of toll for the use thereof, but no greater tolls than the following shall be charged for the use of the said roadway or pathway; for every foot passenger three cents for each passenger one way or five cents for round trip for every horse and rider, five cents; for every carriage; except as hereinafter expressly provided, with horse or horses and occupants, ten cents; for every automobile, except as hereinafter expressly provided, and occupants, ten cents; for loaded wagons and loaded automobile trucks for commercial purposes, two cents for each ton of material carried, and no charge for empty wagons or automobile trucks used for commercial purposes, or for the drivers thereof."
- 143
- 144

XVII.

Found, W. P. R.

That the defendant has failed and neglected to construct or place upon the Black Rock Harbor

Requests to Find.

draw of its said bridge, a roadway for vehicles or a pathway for pedestrians, as required by said Chapter 666 of the Laws of 1915, and has taken no steps toward the construction of such roadway and pathway and has not complied with the regulations of said Chapter 666 of the Laws of 1915, in any particular. 145

XVIII.

146

Found, W. P. R.

That all of the commerce passing over the bridge of the defendant across the Niagara River, between the City of Buffalo, New York, and the Dominion of Canada, is either interstate commerce or foreign commerce between the United States and foreign nations, and said bridge is an instrumentality of such interstate and foreign commerce. 147

XIX.

Found, W. P. R.

That the Niagara River is a navigable water of the United States forming the international boundary between the United States and the Dominion of Canada, a dependency of the British Empire. 148

XX.

Found, W. P. R.

That Black Rock Harbor is the name of that part of said Niagara River which passes between

Requests to Find.

- 149 the mainland of the United States and Squaw Island in said river and said Black Rock Harbor is wholly within the territorial boundaries of the United States and of the State of New York.

XXI.

Found, W. P. R.

- 150 That Squaw Island, exclusive of the right of way of the defendant across the island and a strip 75 feet wide along the Black Rock Harbor shore owned by the United States of America, consists of about 100 acres of upland and 24 acres of land under water, all of which was owned by the Squaw Island Development Corporation, a domestic corporation, up to the time of the trial of this action.

151

XXII.

Refused, W. P. R.

- 152 That Squaw Island is a vacant, undeveloped strip of land, except for certain boat houses and small shacks along the shore occupied during the summer season by tenants of said Squaw Island Development Company who pay a nominal rental therefor. That about a half dozen of said families and a few squatters on government lands remain upon the Island the year around. That said Island is also used for occasional ball games and picnies.

XXIII.

Found, W. P. R.

- That the only commercial business or development upon said Island consists of the removal of

Requests to Find.

sand, gravel and grit therefrom by the Squaw Island Sand & Gravel Corporation, a domestic corporation organized by the same persons interested in the Squaw Island Development Corporation. That said Squaw Island Sand & Gravel Corporation in the year from June, 1915, to June, 1916, removed from said island, by boats, 100,000 tons of gravel. 153

XXIV.

154

Refused, W. P. R.

That in the present state of development of Squaw Island, the traffic available for the roadway and footway which defendant is required to construct by the terms of said statute, would not bring in a revenue to exceed \$2500.00 per annum, at the rates prescribed in said statute. 155

XXV.

Found, W. P. R.

That plans were made for the development of Squaw Island in 1894 and the persons interested in the Squaw Island Development Corporation and the Squaw Island Sand & Gravel Corporation have organized several other corporations for the future development of Squaw Island, including the Squaw Island Freight Terminal Co., Inc., and caused plans to be prepared in February, 1913, for the projected development of Squaw Island as a land and water freight terminal, but no steps have been taken as yet to carry any of such plans into effect. 156

Requests to Find.

157

XXVI.

Refused, W. P. R.

- That the cost of construction of a wing addition to the Black Rock Harbor span of the defendant's bridge, adequate to sustain a suitable roadway 16 feet wide and a footway with proper approaches thereto, including the cost of the land necessary for such approaches, would have been approximately \$44,000.00 on the 31st day of December, 1915, and on the first day of June, 1915, the cost would have been approximately \$200.00 less than on December 31st of said year.

XXVII.

Refused, W. P. R.

- 159 That the annual charge for maintenance and operation of such wing addition, and approaches, including interest on cost of land and improvement, taxes, maintenance and depreciation of steel work, flooring and approaches, painting and wages of toll collectors would be more than \$8,000.00 per annum.

160

CONCLUSIONS OF LAW.

I.

Refused, W. P. R.

- Chapter 666 of the Laws of 1915, requiring the said defendant to construct a footpath and roadway across the Black Rock Harbor of its said bridge and fixing tolls for the use of said foot-

Requests to Find.

path and roadway, was and is null and void, and of no force and effect, because the same impairs the obligation of contracts, to wit: the franchises granted to the defendant by the Legislature of the State of New York and by the Parliament of Canada in and by the acts of its incorporation, and attempts to impose upon said defendant burdens not imposed as conditions of said franchises when the same were granted, to wit: the obligation to maintain a footpath and roadway across the Black Rock Harbor draw of its bridge, and to maintain a bridge and give a passageway from the City of Buffalo to Squaw Island in the State of New York, in contravention of Article 1, Section 10, Subdivision 1 of the Constitution of the United States and said act deprives defendant of its property without due process of law, in contravention of the first section of the 14th amendment to the Constitution of the United States and of Article 1, Section 6 of the Constitution of the State of New York.

161

162

163

164

11.

Refused, W. P. R.

That Chapter 666 of the Laws of 1915, was and is null and void and of no force and effect, because it deprives the defendant of its property without due process of law, in contravention of the first section of the 14th amendment to the Constitution of the United States and of Article 1, Section 6 of the Constitution of the State of New York, in that said Act purports to provide that no charge shall be made by the said defend-

Requests to Find.

- 165 ant for the use of said footpath and roadway across the Black Rock Harbor draw of said bridge, required by said act to be constructed for empty wagons or automobile trucks used for commercial purposes, or for the drivers thereof, and that the tolls fixed for the use of said roadway and pathway are so low and inadequate, in view of the amount of traffic available, that the same will not yield to defendant a fair return upon the investment required for the construction and maintenance of roadway and pathway, and will be confiscatory in their operation and effect.
- 166

III.

Refused, W. P. R.

- That by a general act, approved March 3, 1899 (Chapter 425, Section 9) relating to the construction of bridges over navigable waters of the United States, and requiring that the plans for such bridges be approved by the Secretary of War of the United States, and by said acts of June 30, 1870 (Chapter 186), and June 23, 1874 (Chapter 475) hereinabove found, relating specifically to the said bridge of the defendant, and by said Rivers and Harbors Acts of June 13, 1902, and March 3, 1905, providing for the improvement of Black Rock Harbor, and subsequent acts making further appropriations for said purpose, and by the duly authorized acts of the Secretary of War, approving plans for the construction and reconstruction of said bridge and requiring the reconstruction of the draw of said bridge across the Black Rock Harbor, and approving plans for

Requests to Find.

the same as hereinabove found, and accepting said bridge as completed, in accordance with said plans, and by requiring the cession and conveyance by the State of New York of all of its right, title and interest in and to the lands under the waters of Black Rock Harbor, and of that portion of the Erie Canal adjacent thereto, the Congress of the United States has assumed and exercised exclusive jurisdiction over the bridge of the defendant, including said draw over the Black Rock Harbor, and has assumed and exercised exclusive jurisdiction over said Black Rock Harbor, including that portion thereof which was formerly a part of the Erie Canal.

169

170

IV.

Refused, W. P. R.

171

That Chapter 666 of the Laws of 1915 of the State of New York is null and void and of no force and effect, because it is in contravention of Article 1, Section 8, Subdivision 3 of the Constitution of the United States, providing that the Congress shall have power to regulate commerce with foreign nations and among the several states, and of the acts of Congress hereinabove found, passed under and by virtue of the power so conferred upon congress by the constitution of the United States, and said so-called Act of the Legislature of the State of New York, is an attempted interference with and regulation of such foreign and interstate commerce, and is an attempt to impose additional burdens upon a

172

Exceptions.

173 bridge over navigable waters of the United States forming an international boundary, over which congress has assumed and exercised exclusive jurisdiction, in contravention of said provision of the Constitution of the United States.

Refused, W. P. R.

174 That the defendant is entitled to judgment dismissing the complaint of the plaintiff herein, with costs to be taxed.

V.

Refused, W. P. R.

Let judgment be entered accordingly.

Dated, July , 1916.

.....
Justice Supreme Court.

175

EXCEPTIONS.**SUPREME COURT—ALBANY COUNTY.**

PEOPLE OF THE STATE
OF NEW YORK,

176 *Plaintiffs,*

vs.

INTERNATIONAL BRIDGE
COMPANY,

Defendant.

The defendant hereby excepts to the Findings of Fact and the Conclusions of Law herein, and

Exceptions.

to the court's refusal to find as requested by said defendant, as follows:

I.

Except to so much of the VIIF Finding of Fact as finds that it was held and determined by said Court of Appeals that the Attorney General of said Province of Ontario was not the proper party plaintiff to maintain such an action, and that the court did not have jurisdiction to grant the relief demanded, on the ground that there is no evidence tending to sustain the same.

178

II.

To the XXII Finding of Fact and to each and every part thereof, on the ground that there is no evidence tending to sustain the same.

179

III.

To the XXIII Finding of Fact and to each and every part thereof, on the ground that there is no evidence tending to sustain the same.

IV.

180

To the XXIV Finding of Fact and to each and every part thereof, on the ground that there is no evidence tending to sustain the same.

V.

To the Conclusion of Law numbered I.

Exceptions.

181

VI.

To the Conclusion of Law numbered II.

VII.

To the Conclusion of Law numbered III.

182

VIII.

To the Conclusion of Law numbered IV.

IX.

To the Conclusion of Law numbered V.

183

X.

To the Conclusion of Law numbered VI.

XI.

To the Conclusion of Law numbered VII.

XII.

184 To the Conclusion of Law numbered VIII.

XIII.

To the Conclusion of Law numbered IX.

XIV.

Defendant hereby excepts to the court's refusal to find as requested in defendant's proposed Finding of Fact VIII.

Exceptions.

XV.

185

Defendant hereby excepts to the court's refusal to find as requested in defendant's proposed Finding of Fact XXII.

XVI.

Defendant hereby excepts to the court's refusal to find as requested in defendant's proposed Finding of Fact XXIV.

XVII.

Defendant hereby excepts to the court's refusal to find as requested in defendant's proposed Finding of Fact XXVI.

XVIII.

187

Defendant hereby excepts to the court's refusal to find as requested in defendant's proposed Finding of Fact XXVII.

XIX.

Defendant hereby excepts to the court's refusal to make the Conclusion of Law numbered I, 188 requested by the defendant.

XX.

Defendant hereby excepts to the court's refusal to make the Conclusion of Law numbered II, requested by the defendant.

Exceptions.

189

XXI.

Defendant hereby excepts to the court's refusal to make the Conclusion of Law numbered III, requested by the defendant.

XXII.

190

Defendant hereby excepts to the court's refusal to make the Conclusion of Law numbered IV, requested by the defendant.

XXIII.

191

Defendant hereby excepts to the court's refusal to make the Conclusion of Law numbered V, requested by the defendant.

Dated, November 22, 1916.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant,
Office & Postoffice Address,
302 Erie County Bank Bldg.,
Buffalo, N. Y.

192 To

Clerk of the County of Albany.

Egburt E. Woodbury,
Attorney-General,
Attorney for the Plaintiff.

DECISION.

SUPREME COURT—ALBANY COUNTY. 193

PEOPLE OF THE STATE OR
NEW YORK,
Plaintiffs,
vs.
INTERNATIONAL BRIDGE
CO.,
Defendants.

194

195

This action having regularly come on for trial and having been heard before Hon. William P. Rudd, justice of this court, without a jury, at a Trial Term of this court held on the 20th day of June, 1916, upon the pleadings and proceedings herein, the plaintiffs having appeared by Egburt E. Woodbury, their attorney-general, and the defendant having appeared by Moot, Sprague, Brownell & Marey, its attorneys, and the proofs of both parties having been adduced and their respective counsel heard, and due deliberation having been had thereon, I do decide and find as follows:

FINDINGS OF FACT.

196

I.

That the defendant is a consolidated corporation, formed by the consolidation of a corporation organized under and by virtue of a special act of

Decision.

- 197 -the Legislature of the State of New York, to wit: Chapter 753 of the Laws of 1857, and acts amendatory thereof and supplementary thereto, for the purpose of constructing a bridge across the Niagara river from the City of Buffalo, New York, to some point near Fort Erie in Canada, and a corporation of the same name organized for similar purposes under and by virtue of a special act of the Legislative Council and Assembly of Canada, to wit: Chapter 227 of 20th Victoria. That said New York corporation and said Canadian corporation were duly consolidated in or about the year 1870, pursuant to authority granted by the Legislature of the State of New York, by Chapter 550 of the Laws of 1869, passed on the 4th day of May, 1869, and pursuant to authority granted by the Parliament of Canada by an act passed on or about the 22nd day of June, 1869, to-wit: Chapter 65 of 32nd and 33d Victoria; that said consolidated corporation has its principal office within the United States in the City of Buffalo, New York.

II.

- 200 That in and by said Act of the Legislature of the State of New York (Chapter 550, Laws of 1869) authorizing the consolidation of said New York corporation and said Canadian corporation, it was provided, among other things, as follows:
- “Section 6. Upon the making and perfecting of said agreement and act of consolidation as provided in the preceding section,

Decision.

and filing said agreement as in said section provided, the several corporations, parties thereto, shall be deemed and taken to be consolidated, and to form one corporation by the name in said agreement provided, possessing all the rights, privileges and franchises, and subject to all the disabilities and duties of each of such corporations so consolidated, except as herein provided; but nothing in this act contained shall be construed as in any manner impairing any liability against the corporation in the title of this act mentioned, but such liability shall continue against the consolidated corporation contemplated by this act."

III.

203

That in and by Chapter 753 of the Laws of 1857, incorporating said New York corporation, it was provided that said bridge should be constructed with two draws, one across Blaek Rock Harbor and the other across the main channel of the river, and it was further provided, among other things, as follows:

"Section 15. Said bridge may be constructed as well for the passage of persons on foot and in carriages and otherwise, as for the passage of railroad trains."

That the sixteenth section of said act provided for the erection of toll gates upon the completion of said bridge for the passage of ordinary teams and carriages and authorized the directors to fix

Decision.

205 rates of toll not greater than the amounts specified in said section.

IV.

That in and by Chapter 227 of 20th Victoria, incorporating said Canadian corporation, it was provided, among other things, as follows:

206 "XIV. The said bridge shall be as well for the passage of persons on foot and in carriages and otherwise, as for the passage of railway trains."

V.

That the Congress of the United States, by an act approved June 30, 1870, entitled Chapter 176 of the Acts of 1870, provided that any bridge and its appurtenances which should be constructed across the Niagara river from the City of Buffalo, New York, to Canada, in pursuance of the provisions of said Act of the New York Legislature incorporating said International Bridge Company, or of any acts of said Legislature then in force amending the same, should be lawful structures, and said Act of Congress authorized the same to be constructed and maintained as provided by said Act of the New York Legislature and such amendments thereto, anything in any law or laws of the United States to the contrary notwithstanding, and said Act of Congress further declared said bridge to be an established post route for the mails of the United States, and

Decision.

provided that the location of said bridge should 209
 be subject to the approval of the Secretary of
 War, but not to be located south of Squaw Island,
 and further provided that such bridge should
 have at least two draws of not less than 160 feet
 in width in clear between the piers, which should
 be located at the points best calculated to accom-
 modate the commerce of said river, and that the
 piers of said bridge should be parallel to the 210
 current of said river and that said bridge should be
 subject in its construction to the supervision of
 the Secretary of War of the United States, to
 whom the plans and specifications relative to its
 construction should be submitted for approval,
 and that all railway companies desiring to use
 said bridge should have and be entitled to equal
 rights and privileges in the passage of the same
 and in the use of the machinery and fixtures 211
 thereof and of all the approaches thereto, upon
 such terms and conditions as should be prescrib-
 ed by the District Court of the United States for
 the Northern District of New York, upon hearing
 the allegations and proofs of the parties in case
 they should not agree, and said Act of Congress
 further provided that the right to alter or amend
 said Act, so as to prevent or remove all material 212
 obstructions to the navigation of said river by
 the construction of said bridge was thereby ex-
 pressly reserved.

VI.

That thereafter and in or about the years 1870
 to 1874, said bridge was constructed by the de-

Decision.

213 defendant with two draws, one across Black Rock Harbor and the other across the main channel of the river, as provided by said Act of the Legislature of the State of New York incorporating said Bridge Company, but said bridge was constructed as a railroad bridge, exclusively, without any provision for footpaths or roadways thereon.

214

VII.

That after the completion of said bridge an act was passed by the Congress of the United States and approved on the 23d day of June, 1874, entitled Chapter 475 of the Acts of 1874, approving the modifications in the plans of said bridge, and declaring said bridge, as constructed, to be a lawful structure, and an established post route for
215 the mail of the United States.

VIII.

That in or about the year 1881, an information was filed by the Attorney General of the Province of Ontario, seeking to restrain the use of said bridge by railways until the same should be put into condition for ordinary traffic, or in the alternative, for the removal of said bridge as a nuisance, or to compel permission for its use by foot passengers on payment of the statutory tolls. That said proceeding was prosecuted to the Court of Appeal for the said Province of Ontario, and it was held and determined by said Court of Appeal, that the Attorney General of said Province

Decision.

of Ontario was not the proper party plaintiff to maintain such an action, and that said bridge did not constitute a nuisance, and that the court did not have jurisdiction to grant the relief demanded.

217

IX.

That thereafter and in or about the years 1899-
1901, said bridge was rebuilt by the defendant,
and in connection therewith plans for the re-
building of said bridge were submitted to and
approved by the Secretary of War of the United
States, on or about the 29th day of March, 1899
as required by Act of Congress in such case made
and provided; that the written approval of said
plans by said Secretary of War contained the fol-
lowing provisions:

218

"That if the Secretary of War shall here-
after deem it necessary or advisable that the
portion of the bridge over Black Rock Har-
bor shall be remodeled or changed in any
manner, such change shall be made by the
owners of the bridge, or their assigns, at
their own expense."

219

220

X.

That said plans, so approved, by said Secre-
tary of War showed wings to be constructed on
either side of said proposed new bridge, for the
accommodation of roadways and footpaths, but
that in the building of said new bridge, said de-

Decision.

- 221 defendant deviated from said plans so approved by the Secretary of War, in that it omitted entirely the construction of said wings, and made no provision for roadways or footpaths upon said new bridge; that said bridge was rebuilt under the supervision of the resident representative at Buffalo of the Secretary of War and said modification in said plans approved by the Secretary of War was duly reported by said representative to said Secretary of War and said Secretary of War acquiesced in and assented to said modification.
- 222

XI.

- That the Congress of the United States, in and by the Rivers & Harbors Act, approved June 13 223 1902, provided that the Secretary of War and Chief of Engineers of the Army should make an investigation of Black Rock Harbor, with a view of obtaining a suitable channel for deep water craft around the rocks and shoals at the head of Niagara river and in compliance with said Act, the Secretary of War, on or about January 13, 1904, transmitted to the House of Representatives certain reports of a preliminary examination and survey of said Black Rock Harbor; that thereafter, the Congress of the United States, by the Rivers and Harbors Act, approved March 224 3, 1905, made an appropriation for the improvement of Black Rock Harbor, in accordance with said report, and plans and specifications were thereupon prepared to carry out said improve-

Decision.

ment; and Congress thereafter, in the Rivers and Harbors Acts of subsequent years, made further appropriations for the carrying out of said improvement; that it was a part of the project for the improvement of said Black Rock Harbor, that the United States should acquire all of the right and title of the State of New York, if any, to the lands and waterways necessary to said improvement, including that portion of the Erie canal adjacent to Black Rock Harbor, and the lands under the waters of Black Rock Harbor, and the United States required a conveyance thereof from the State of New York as a condition of making said improvement.

225

226

XII.

That thereafter, by Chapter 373 of the Laws of 1904, the Legislature of the State of New York authorized the Land Board to convey to the United States such lands now owned by the state under the waters of the Niagara river, or in the vicinity of said river in the City of Buffalo, including such lands as were then used for canal purposes in said city, and as might be deemed abandoned by the Canal Board, as might be required by the United States in the construction of said Ship Canal. That thereafter, and on the 28th day of June, 1905, the Canal Board of the State of New York duly passed a resolution abandoning the portion of the Erie canal adjacent to Black Rock Harbor and all of the lands under water of Black Rock Harbor, and adjacent to

227

228

Decision.

- 229 the place where the same is crossed by the bridge of this defendant, upon condition that the United States should do the work referred to and provided for in said Act of Congress, and a like resolution was duly passed by the Commissioners of the land office of the State of New York; and thereafter, and on or about the 15th day of July, 1905, pursuant to said resolutions and in accordance with said Chapter 373 of the Laws of 1904,
- 230 the State of New York duly conveyed to United States, by a deed dated on that day and recorded in Erie County Clerk's office on the 11th day of January, 1906, in Liber 1018 of Deeds at page 315, all the right, title and interest of the State of New York in and to said lands and waterways, including the portion of the Erie canal and towpath adjacent to the Black Rock Harbor and the lands under the water of the Black Rock Harbor, and said lands and waters have ever since been under the exclusive jurisdiction and control of the United States, which has exercised undisputed authority over them, in connection with the improvement of Black Rock Harbor, which was commenced shortly thereafter by the United States and has since been completed.

232

XIII.

That thereafter and in or about the year 1907 the Secretary of War served a notice, dated April 2, 1907, upon said defendant, stating that said Secretary of War had good reason to believe that said bridge over Black Rock Harbor and Erie

Decision.

canal, being a part of the International Bridge, 233 was an unreasonable obstruction to the free navigation of Black Rock Harbor and channel as projected, and requiring the defendant to remove the existing pivot pier and side span and to construct a bridge, in accordance with the requirements of the Secretary of War specified in said notice.

XIV.

234

That pursuant to the requirements of said notice, the defendant submitted plans to the Secretary of War for the rebuilding of that portion of its bridge over Black Rock Harbor; that said plans showed wings on each side of said proposed bridge for the purpose of accommodating roadways and footpaths but said wings were shown in dotted lines and were stated upon said plans to be "for future roadway" and there was a notation upon said plans as follows: "Roadways shown in dotted lines not to be put in at present, but provision is made in the design of the bridge for their future construction;" That said plans containing said notation, were duly approved by the Secretary of War of the United States and said bridge was thereafter built by the defendant over said Black Rock Harbor, but the said wings were not constructed by the defendant and no provision was made upon said bridge for roadways and footpaths. 235 236

XV.

That said bridge was constructed under the supervision of the resident representative of the

Decision.

- 237 Secretary of War d after the completion there-of, said representative duly reported to the Secretary of War the completion of said bridge, in accordance with the approved plans for its construction.

XVI.

- 238 That thereafter the Legislature of the State of New York, by Chapter 666 of the Laws of 1915 amended Chapter 753 of the Laws of 1857, incorporating said International Bridge Company, by adding thereto a new section after Section 15, to be known as Section 15-A, and to read as follows:

- 239 "15-A. A roadway for vehicles and a pathway for pedestrians shall be constructed upon the draw across Black Rock Harbor giving a passageway over said draw between Squaw Island and the mainland of New York State, such roadway and footpath to be completed and ready for use by January first, nineteen hundred and sixteen, and in case of the failure of said corporation or its successor in interest so to complete the same on or before said date, said corporation, or its successor in interest, shall be liable to a penalty of fifty dollars per day for each day that it shall be in default. Such penalty may be sued for and collected by the Attorney-General in any court of competent jurisdiction.

Upon the completion of said roadway and pathway said company may erect toll gates

Decision.

and fix rates of toll for the use thereof, but 241
no greater tolls than the following shall be charged for the use of the said roadway or pathway; for every foot passenger three cents for each passenger one way or five cents for round trip; for every horse and rider, five cents; for every carriage, except as hereinafter expressly provided, with horse or horses and occupants, ten cents; for every automobile, except as hereinafter expressly provided, and occupants, ten cents; for loaded wagons and loaded automobile trucks for commercial purposes, two cents for each ton of material carried, and no charge for empty wagons or automobile trucks used for commercial purposes, or for the drivers thereof.” 242

XVII.

243

That the defendant has failed and neglected to construct or place upon the Black Rock Harbor draw of its said bridge, a roadway for vehicles or a pathway for pedestrians, as required by said Chapter 666 of the Laws of 1915, and has taken no steps toward the construction of such roadway and pathway and has not complied with the regulations of said Chapter 666 of the Laws of 1915, in any particular. 244

XVIII.

That all of the commerce passing over the bridge of the defendant across the Niagara river,

64

Decision.

- 245 between the City of Buffalo, New York, and the Dominion of Canada, is either interstate commerce or foreign commerce between the United States and foreign nations, and said bridge is an instrumentality of such interstate and foreign commerce.

XIX.

246

- That the Niagara river is a navigable water of the United States forming the international boundary between the United States and the Dominion of Canada, a dependency of the British Empire.

XX.

247

- That Black Rock Harbor is the name of that part of said Niagara river which passes between the mainland of the United States and Squaw Island in said river and said Black Rock Harbor is wholly within the territorial boundaries of the United States and of the State of New York.

XXI.

248

- That Squaw Island in said river is wholly within the territorial boundaries of the United States and of the State of New York.

XXII.

- The probable cost of constructing the roadway and footpath required by Chapter 666 of the Laws

Decision.

of 1915, is insignificant in comparison to the assets and annual net earnings of the defendant. 249

XXIII.

There is no evidence in the record showing that the investment required by Chapter 666 of the Laws of 1915, would not yield a reasonable return to the defendant. 250

XXIV.

The construction of the roadway and footpath required by Chapter 666 of the Laws of 1915, was and is necessary for the public interest and for the public convenience.

CONCLUSIONS OF LAW.

251

I.

Chapter 666 of the Laws of 1915 does not contravene any of the provisions of Article I, Section 10, Subdivision 1 of the Constitution of the United States. 252

II.

Chapter 666 of the Laws of 1915 does not contravene any of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Decision.

253

III.

Chapter 666 of the Laws of 1915 does not contravene any of the provisions of Article 1, Section 6 of the Constitution of the State of New York.

IV.

254 Chapter 666 of the Laws of 1915 does not contravene any provision of Article 1, Section 8 Subdivision VII of the Constitution of the United States or any act of Congress enacted thereunder.

V.

255 Chapter 666 of the Laws of 1915 does not contravene any provision of Article I, Section 8 Subdivision III of the Constitution of the United States or any act of Congress enacted thereunder.

VI.

256 Chapter 666 of the Laws of 1915 does not contravene any provision of any act of Congress regulating or affecting the navigable waters of the United States.

VII.

Chapter 666 of the Laws of 1915 is within the police power of the State of New York and is a proper, reasonable and valid exercise thereof.

Decision.

VIII.

257

Chapter 666 of the Laws of 1915 is not violative of any constitutional provision or paramount statute of the United States or of the State of New York.

IX.

258

Defendant is liable to a penalty of fifty dollars for each day after the first day of January, 1916, during which it failed to construct a roadway for vehicles and a pathway for pedestrians, upon the draw across Black Rock Harbor, giving a passageway over said draw between Squaw Island and the mainland of New York State, and having been so in default for ten days prior to the commencement of this action, the plaintiffs are entitled to judgment against the defendant herein for the sum of five hundred (\$500) dollars, with interest from January 10, 1916, and with costs to be taxed.

259

Let judgment be entered accordingly.

Dated, Albany, N. Y., October , 1916.

260

WM. P. RUDD,
Justice Supreme Court.

JUDGMENT.

261 SUPREME COURT—ALBANY COUNTY.

PEOPLE OF THE STATE
OF NEW YORK,
vs.
INTERNATIONAL BRIDGE
COMPANY,
262 *Plaintiffs,*
Defendant.

The issues in this action having been regularly brought on for trial before Mr. Justice William P. Rudd at an adjourned Trial Term of this court, held on the 20th day of June, 1916, at the City Hall in the City and County of Albany and the plaintiffs appearing by Egburt E. Woodbury, Esq., their attorney-general, and the defendant appearing by Moot, Sprague, Brownell and Marcy, Esqs., its attorneys; and a jury having been waived by both parties; and the court having heard the allegations and proofs of the parties, and, after due deliberation having duly made its decision and filed the same on the 18th day of November, 1916, containing a statement of the facts found and the conclusions of law thereon, and directing judgment as hereinafter stated; and the plaintiffs' costs having been duly taxed at two hundred eighteen and 76/100 dollars (\$218.76), now, on motion of Egburt E. Woodbury, attorney-general, attorney for plaintiffs, it is,

ADJUDGED, that plaintiffs, the People of the State of New York, do recover of the defendant,

Case and Exceptions.

International Bridge Company, the sum of five **265**
 hundred dollars (\$500) with interest thereon
 from January 10, 1916, amounting to twenty-five
 and 66/100 dollars (\$25.66), together with two
 hundred eighteen and 76/100 dollars (\$218.76)
 costs as taxed, making in all the sum of seven
 hundred forty-four and 42/100 dollars (\$744.42).
 and that said plaintiffs have execution therefor.

266

Dated, November 20, 1916.

WM. J. GRATTAN,
Clerk.

CASE AND EXCEPTIONS.

SUPREME COURT—ALBANY COUNTY.

267

THE PEOPLE OF THE
 STATE OF NEW YORK, }
 vs. }
 INTERNATIONAL BRIDGE
 COMPANY. }

268

Appearances:

For the plaintiff, E. E. Woodbury, Attorney-General, by J. S. Y. Ivins, Deputy Attorney-General, Ralph A. Kellogg and Francis F. Baker.

For the City of Buffalo, Fred C. Rupp.

For defendant, Adelbert Moot and Mrs. Helen Z. M. Rodgers.

Case and Exceptions.

269 The issues in the above entitled action came on for trial at a Trial Term of the Supreme Court, held in the City Hall, in the City of Albany, N. Y., on Tuesday, June 20, 1916, before Hon. William P. Rudd, J., when the following proceedings were had:

Mrs. Rodgers opened the case on behalf of the defendant.

270 Mr. Ivins opened the case on behalf of the plaintiff.

It is stipulated that the embankment and trestle on Squaw Island were constructed at the same time as the iron and steel structure across Niagara river, running from Squaw Island westerly to the Dominion of Canada, and across the Black Rock Harbor, the easterly channel of the Niagara river.

271 Mrs. Rodgers: We offer in evidence Chapter 753 of the Laws of 1857, being the original act of the Legislature of the State of New York, incorporating the International Bridge Company.

Received and marked "Defendant's Exhibit 1."

272 Mrs. Rodgers: I offer in evidence Chapter 227, 20th Victoria, which is the Canadian Act incorporating the International Bridge Company, a certified copy of that act.

Received and marked "Defendant's Exhibit 2."

Mrs. Rodgers: I offer in evidence Chapter 550 of the Laws of 1869, being the act of the New York Legislature, authorizing the consolidation of the New York and Canadian corporations.

Case and Exceptions.

Received and marked "Defendant's Exhibit 273
3."

Mrs. Rodgers: I offer in evidence Chapter 65
of 32nd and 33rd Victoria, of the year 1869, being
the Canadian Act authorizing the consolidation
of the two companies.

Received and marked "Defendant's Exhibit
4."

Mrs. Rodgers: I offer in evidence act of Congress,
approved June 30, 1870, Chapter 176, being
the act authorizing the construction and
maintenance of the International Bridge across
the Niagara river.

274

Received and marked "Defendant's Exhibit
5."

(Mrs. Rodgers read portions of the same to the
court).

Mrs. Rodgers: I offer in evidence act of Congress,
dated June 23, 1874, Chapter 475, being the
act declaring the bridge a lawful structure, after
it was completed.

275

Received and marked "Defendant's Exhibit
6."

Mrs. Rodgers: I offer in evidence a certified
copy of deed, dated May 18, 1871, between the
Niagara River Hydraulic Company, and the Interna-
tional Bridge Company. This is the original
deed of the right of way across Squaw Island.

276

Received and marked "Defendant's Exhibit
7."

(Mrs. Rodgers read portions of the same to the
court).

Mrs. Rodgers: I offer in evidence deed dated

72

Case and Exceptions.

- 277 August 6, 1874, between the Niagara River Hydraulic Company and the International Bridge Company.

Received and marked "Defendant's Exhibit 8."

Mrs. Rodgers: I offer in evidence a copy of the report of the decision of the Attorney General vs. The International Bridge Company, reported in 6 Ontario Appeals Reports, 537.

- 278 Received and marked "Defendant's Exhibit 9."

Mrs. Rodgers: I offer in evidence plan for rebuilding the International Bridge, dated December 10, 1898, with the approval of the Secretary of War, dated March 29, 1899, attached.

Received and marked "Defendant's Exhibit 10."

- 279 Mrs. Rodgers: I offer in evidence a copy, certified by the Secretary of War, of a letter dated September 9, 1901, addressed to General G. L. Gillespie, Chief of Engineers, U. S. Army, Washington, D. C., from T. W. Symons, Major, Corps of Engineers.

Mr. Ivins: I object on the ground that these letters are irrelevant, incompetent and immaterial to the issue.

- 280 Objection overruled. Plaintiff excepted.

Received and marked "Defendant's Exhibit 11."

Mrs. Rodgers: I offer in evidence an excerpt from the Congressional Rivers and Harbors appropriation bill of June 13, 1902, Chapter 1079.

Received and marked "Defendant's Exhibit 12."

Case and Exception.

Mrs. Rodgers: I offer in evidence an excerpt from Congressional Sundry appropriation bill for 1903, Chapter 1007. 281

Received and marked "Defendant's Exhibit 13."

Mrs. Rodgers: I offer in evidence copy of document No. 428, 58th Congress, second session, House of Representatives, being a communication to the House of Representatives from the Secretary of War, dated January 13, 1904, transmitting reports of Major Symons and Major Bingham, regarding the Black Rock Harbor, and also containing the opinion of Attorney General, Gunneen, dated February 15, 1903, in regard to the abandonment and cession of lands under Black Rock Harbor and the adjacent portion of the Erie canal from the State of New York to the United States. 282

Received and marked "Defendant's Exhibit 14."

Mrs. Rodgers: I offer in evidence an excerpt from the proceedings of the Commissioners of the Land Office, at a meeting held May 25, 1905, reported at pages 124 and 125 of the proceedings for 1905. 283

Received and marked "Defendant's Exhibit 15." 284

Mrs. Rodgers: I offer in evidence Chapter 373 of the Laws of 1904, being an act authorizing the conveyance of land in the City of Buffalo to the United States.

Received and marked "Defendant's Exhibit 16."

Case and Exceptions.

285 Mrs. Rogers: I offer in evidence an excerpt of the Congressional Rivers and Harbors appropriation bill of 1905, Chapter 1482.

Received and marked "Defendant's Exhibit 17."

286 Mrs. Rodgers: I offer in evidence an excerpt from the proceedings of the Commissioners of the Land Office; at a meeting held June 28, 1905, found on pages 152 to 158 of the proceedings of 1905.

Received and marked "Defendant's Exhibit 18."

Mrs. Rodgers: I offer in evidence deed dated July 25, 1905, from the People of the State of New York to the United States of America.

Received and marked "Defendant's Exhibit 19."

287 Mr. Moot: There will be no question about this deed of land including lands going under the easterly part of this bridge?

Mr. Ivins: Oh, no, we will admit that.

Mrs. Rodgers: I offer in evidence excerpt from Congressional Sundry appropriation bill of 1906, being Chapter 3914.

288 Received and marked "Defendant's Exhibit 20."

Mrs. Rodgers: I offer in evidence an excerpt from the Congressional Rivers and Harbors appropriation bill of 1907, being Chapter 2509.

Received and marked "Defendant's Exhibit 21."

Mrs. Rodgers: I offer in evidence an excerpt from Congressional Sundry appropriations bill of 1907, Chapter 2918.

Case and Exceptions.

Received and marked "Defendant's Exhibit 289
22."

Mrs. Rodgers: I offer in evidence a notice, dated July 18, 1907, from the Secretary of War to the International Bridge Company, and also a like notice to the Grand Trunk Railway Company, requiring the reconstruction of the Black Rock Harbor span of the International Bridge.

Received and marked "Defendant's Exhibits 290
23 and 24."

Mrs. Rodgers: I offer in evidence a certified copy of plans, dated August, 1909, for the reconstruction of Black Rock Harbor draw span, being the plans filed in the office of the Chief Engineer of the United States Army.

Received and marked "Defendant's Exhibit
25."

Mrs. Rodgers: I offer in evidence letter dated September 14, 1909, from the acting Secretary of War to Mr. Howard G. Kelly, Chief Engineer of the International Bridge Company and the Grand Trunk Company, approving the plans of August, 1909.

Received and marked "Defendant's Exhibit
26."

Mrs. Rodgers: I offer in evidence excerpt 292 from the Rivers and Harbors Act of 1909, Chapter 264.

Received and marked "Defendant's Exhibit
27."

Mrs. Rodgers: I offer in evidence excerpt from Congressional Rivers and Harbors appropriation bill of 1910, Chapter 382.

Case and Exceptions.

- 293 Received and marked "Defendant's Exhibit 28."

Mrs. Rodgers: I offer in evidence Chapter 666 of the Laws of 1915, being the act requiring the construction of this footpath and roadway.

- Received and marked "Defendant's Exhibit 29."

- 294 Mrs. Rodgers: I offer in evidence certified copy of letter dated December 6, 1915, from L. V. Frazier, Major, Corps of Engineers, to the Chief of Engineers, United States Army, Washington, D. C. That is a letter stating the completion of the Black Rock span of the bridge according to the plans.

- Received and marked "Defendant's Exhibit 30."

- 295 Mr. Ivins: All these letters from the Secretary of War go in under the same objection?

The Court: Yes.

- 296 Mrs. Rodgers: I offer in evidence a letter dated December 6, 1915, from Major L. V. Frazier to Mr. William L. Marcy; that letter simply states the method of acceptance of bridges by the Secretary of War and is offered for the purpose of avoiding the necessity of bringing Major Frazier here as a witness to testify.

- Received and marked "Defendant's Exhibit 31."

H. R. Safford, for Deft., Direct.

H. ROBINSON SAFFORD, sworn for defendant, 297
ant, testified:

Examined by Mr. Moot:

Q. Mr. Safford, what is your profession? A. Civil Engineer.

Q. How long has that been your profession? A. 21 years continuously.

Q. Your experience in the profession has been gained how? A. It has been largely in connection with railroad construction, maintenance and operation.

Q. In what countries? A. In the United States and Canada.

Q. At the present time what is your position? A. My position is Chief Engineer of the International Bridge Company and the Grand Trunk Railway.

Q. How long have you been the Chief Engineer of the International Bridge Company and the Grand Trunk Railway? A. Since October, 1911.

Q. Have you had occasion to make an examination of the International Bridge and its surroundings in connection with your duties? A. 300 Yes.

Q. So that you know them? A. Yes.

Q. (Presenting same) I show you a photograph marked 1, marked on the back as taken from the west end of the railroad embankment on Squaw Island looking southeast. Do you recognize that photograph? A. Yes.

H. R. Safford, for Deft., Direct.

301 Q. As giving a correct view from the point indicated? A. Yes, it so appears to me.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 31-A."

302 Q. (Presenting same) I show you a photograph marked 2, taken from the same point as No. 1, looking west through the bridge to Canada; is that a correct photograph of what you see located at that point looking west through the bridge to Canada? A. It is.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 32."

303 Q. (Presenting same) I show you a photograph No. 3, taken from the same point as No. 1, looking north toward the north end of Squaw Island; is that a correct view from the point indicated?

Mr. Baker: I object to that on the ground that it doesn't appear what the date is, and it appears that there are squatters there and there are no squatters on the island. I make that objection for the Attorney-General, he not being familiar with the situation.

304 Mr. Moot: I am not offering the statements on the back of the photograph.

Mr. Baker: Then that is all right. Objection withdrawn.

Received and marked "Defendant's Exhibit 33."

A. Yes, it is.

H. R. Safford, for Deft., Direct.

Q. (Presenting same) I now show you another photograph taken on the west shore line of Squaw Island, about 200 feet south of the railroad embankment, looking northwest obliquely at the International Bridge toward Canada; is that a correct view? A. It is. 305

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 34." 306

Q. (Presenting same) I now show you a view No. 5, taken from the west shore line of Squaw Island about 300 feet south of railroad embankment, looking northeast across island; is that a correct view? A. It is.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 35." 307

Q. (Presenting same) I now show you No. 6, taken from the west shore line of Squaw Island, about halfway between the railroad embankment and south end of island, looking northeast across the island; is that a correct view? A. It is. 307

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 36." 308

Q. (Presenting same) I now show you No. 7, taken at the extreme south end of Squaw Island, the shore line, looking north up the island toward the railroad embankment; is that a correct view? A. It is.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 37." 308

H. K. Safford, for Deft., Direct.

309 Q. (Presenting same) I now show you No. 8, taken from the east shore line of Squaw Island, about halfway between railroad embankment and south end of island, looking northwest across island; is that a correct view? A. It is.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 38."

310 Q. (Presenting same) I now show you No. 9, taken at a point about two-thirds of the way north from the railroad embankment toward the north end of island and about the center of island, looking north at north end of island; is that a correct view? A. Yes, it is.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 39."

311 Mr. Baker: I object to this statement on the back of the photograph.

Mr. Moot: I am not offering the statements on the back of these photographs in any case. That is simply our method of identification. I don't claim that these statements on the back are evidence, or that Mr. Safford is testifying to them.

312 Q. (Presenting same) I now show you No. 10, taken from the same point as No. 9, looking southwest across island; is that a correct view? And when I say a correct view I mean not to date, but at some time after 1911 when you were there inspecting the property, I don't know when your last inspection was. A. It is.

Mr. Moot: I offer that in evidence.

H. R. Safford, for Deft., Direct.

Received and marked "Defendant's Exhibit 40." 313

Q. (Presenting same) I show you No. 11, taken from the same point as No. 9, looking southeast across island; is that a correct view from that point of view? A. It is.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 41." 314

Q. (Presenting same) I now show you a photograph not numbered, and ask you to look at it and tell us what it shows and from what point of view it was evidently taken? A. This photograph is taken from the northwest corner of the draw span over the harbor looking to the southeast, and shows obliquely the span.

Q. Over the harbor? A. Over the harbor.

Q. (Mr. Baker) Of the present bridge? A. 315
Of the present bridge.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 42."

Q. (Presenting same) I now show you another photograph not numbered, and ask you to look at that and tell us what that shows? A. That is a view of the present bridge over the 316 harbor, taken from a point near the northeast corner of the bridge and looking almost due west.

Q. And showing the bridge over what part?
A. Showing the bridge over the harbor.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 43."

H. R. Safford, for Deft., Direct.

317 Q. (Presenting same) I now show you another photograph not numbered and ask you to look at that and tell us what that shows? A. That is a photograph of the bridge over the harbor, taken from a point near the southwest corner of the span and looking northeasterly, and shows the bridge over the harbor.

Mr. Moot: I offer that in evidence.

318 Received and marked "Defendant's Exhibit 44."

Q. (Presenting same) I now show you still another unnumbered view and ask you to look at that and tell us what that shows? A. That is a view of the bridge over the harbor, taken from a point near the southeast corner of the span and looking almost due west, and is a picture of the bridge over the harbor.

319 Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 45."

320 Q. (Presenting same) I now show you still another unnumbered view and ask you to look at that and tell us what that is? A. That is a view of the span over the harbor, taken from a point very close to the center of the span and at the west end of it.

Q. Looking easterly? A. Looking through the bridge.

Q. Over the harbor? A. Looking through the bridge over the harbor.

Q. Easterly? A. Easterly.

Q. (The Court) The first view was a single track? A. That (indicating) is the river bridge; that (indicating) is the main span.

H. R. Safford, for Deft., Direct.

Mr. Moot: I offer that in evidence. 321

Received and marked "Defendant's Exhibit 46."

Q. (The Court) Is there a double track on the embankment? A. Yes.

By Mr. Ivins:

Q. A switch seems to be near the bridge? A. Yes.

Q. And it is a double track from there all the way on? A. It is. 322

By Mr. Moot:

Q. (Presenting same) I now show you still another unnumbered view and ask you to look at that and tell us what that is? A. That is a view taken from the east end of the draw span over the harbor and near the center of the span, looking through the harbor bridge.

Q. Westerly? A. Westerly. 323

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 47."

Q. (The Court) That is looking toward the mainland? A. That is looking toward the mainland.

Q. Mr. Safford, since this matter has come up and Chapter 666 of the Laws of this State for 324 1915 became a subject of discussion, at some time did you look the situation over there and make some study of it with a view to making an estimate of what it would cost to comply with the provisions of that chapter of the Laws of this State? A. I did.

H. R. Safford, for Deft., Direct.

325 Q. About when did you make that study? A. I don't think I can recall the date that I made the first study, but it must have been about the time that this act was passed. I don't remember the date of the act. It was some months ago, however.

Q. Do you remember whether it was just before or just after the act was passed; can you tell that now? A. I can't recall that now.

326 Q. Do you know whether any copy of your figures or your estimate was furnished to the Attorney-General's office or not, or don't you know that? A. I don't know that; I am not able to say.

Q. Have you with you an estimate of what it would cost to comply with the provisions of that act? A. I have.

327 Q. I think you revised that some this morning, did you not? A. I did, yes.

Q. Won't you let me see that? (Witness produces same.)

Q. Those figures you have in your hand, that your assistant just handed to you, are the revised figures you made this morning? A. Yes, sir.

328 Q. You have two estimates there in your hand? A. Yes, sir.

Q. What is the difference between the two; I don't mean in dollars and cents, but I mean what is the basis of the difference between the two? A. One is an estimate for the highway arm to be constructed on the north side of the span over the harbor; the other is the cost of a similar highway on the south side.

H. R. Safford for Deft., Direct.

Q. The bridge you have made an estimate for or the addition to the bridge which you have made an estimate for in each case is to furnish accommodations according to the act for what? A. 329 For roadway traffic.

Q. So that both vehicles and foot passengers can use the addition? A. Yes, sir.

Q. Is there a difference in the cost of putting such an addition to the bridge over Black Rock harbor, whether it is put on the north or the south side? A. As far as the roadway on the span itself is concerned it makes no difference which side it is put on. 330

Q. But it does make a difference which side it is put on for some other reason? A. Yes.

Q. What other reason? A. One difference is a wall is necessary to retain the slope of the approach along the Niagara street entrance, which is not required if it goes on the north side. I will change that. One difference is if the roadway is built on the south side a retaining wall is necessary to retain the slope of the approach adjacent to Niagara street. 331

Q. Niagara street, Buffalo? A. Buffalo. If the roadway is built on the north side that wall is not necessary. 332

Q. In dollars and cents what is the difference between the amount it would cost to build such a foot and vehicle bridge, whether you put it on the north side or whether you put it on the south side?

Mr. Ivins: Before they go into any figures as to the price in dollars and cents at all. I want to enter this objection, that

H. R. Safford, for Deft., Direct.

333 whether or not this act is confiscatory de-pends entirely on relative values, and I insist before they go into any figures with re-gard to the cost of anything they have got to show what their balance sheets are and how well they can afford to make that ex-penditure.

334 After argument by respective counsel the objection was overruled, to which plaintiff excepted.

(Question repeated). A. The difference in cost of building the roadway and approaches is approximately \$1487. That is exclusive of lands up there.

Q. Exclusive of land? A. Yes.

335 Q. That is due to this retaining wall on the one side and the absence of it on the other, in the main? A. Yes.

Q. And when you take into account the land for the approaches to such an entrance to the bridge, then what is the difference?

Mr. Ivins: Mr. Safford hasn't yet been qualified as an expert in land value.

The Court: He is the Chief Engineer of the defendant. I assume that he must know the cost.

336 Mr. Ivins: I just wanted to get him qualified, because I am going to ask him some land value questions later on.

A. The approximate difference of the cost of the two pieces of land required for the approach is \$11,300.

Q. Which side being the more expensive of the

H. R. Safford, for Deft., Direct.

two? A. The north side is the more expensive 337
of the two.

Q. That difference is based on the actual cost
of the land? A. Yes, the actual cost.

Q. And actual purchase? A. Actual pur-
chase.

Q. Do you know the land values and other
values involved in an estimate of the cost of building
this addition to the bridge and its approach-
es? A. Yes, sir.

Q. Your estimate shows that to build the ad-
dition on the north side of the bridge, including
the land for the approaches, would cost how
much? A. The total estimate, including the cost
of the land on the north side is \$56,071.12.

Q. And on the south side? A. \$44,778.92.

Q. Now the maintenance of such an addition
to the bridge, I suppose after it was built it
doesn't make any difference which side it is prac-
tically, except as to the interest, that is the only
difference, is it not? A. That is practically the
only difference, on account of the value of the
land.

Q. Well, we will take it on the less costly of
the two because then we only have to figure the
interest to get the other difference. What is the
maintenance cost annually? A. The interest
and taxes on the land, estimated at six per cent
on the cost or six per cent, on \$13,200 represents
an annual burden of \$792. The interest on the
physical improvement, estimated at five per cent,
on \$32,576.12 is \$1628.86. The maintenance and
depreciation on the steel work is estimated at five

H. K. Safford, for Deft., Direct.

341 per cent. on the sum of \$12,770 and amounts to \$638.50 per year. The estimated annual cost of painting, \$45. The maintenance and depreciation of the flooring is estimated at 20 per cent. on a cost of \$4125, and represents \$825 per year. On the approaches, the annual maintenance and depreciation, estimated at 10 per cent. on the sum of \$15,656.12, represents \$1565.16 per year. That covers the interest and maintenance.

342 Q. And on the operation? A. It is assumed that it would be necessary to employ two men, one days and one nights, to collect toll and protect foot passengers. Assuming those men to be paid \$60 per month, the annual cost for that item would be \$2880 per year.

Q. Or on the least cost of the two possible additions your maintenance annually is how much?
343 A. The annual fixed charge is estimated at \$8,374.

It is stipulated that in Squaw island, outside of the bridge lands and the Government lands, excluding those but including the lands under water between the harbor line and the island, there are 124 acres.

Q. You have seen Squaw island several times,
344 Mr. Safford? A. Yes.

Q. Are there industries, or is there any business there from which the International Bridge Company now receives an annual revenue? A. None to my knowledge.

Q. So that if you built this addition you would build it in expectation, upon the promises of the people who owned the island as to what could be developed on the island if the addition was built?

H. R. Safford, for Deft., Cross.

A. That would appear to be the only prospect of 345 business at this time.

Q. You have no contract of any kind that would assure you any business if you built the addition to the bridge? A. No, none at all.

Q. (The Court) There are no truck gardens on the island? A. Not to my knowledge.

Q. Is it equally practicable to construct the driveway arm on either side, south or north? A. 346 Yes, unless there was some development that would make it difficult to construct the driveway on one or the other side which doesn't exist now.

Q. As a matter of fact the larger part of the island is south of the bridge, and therefore any development would be more likely to be on the side of the approach as to which would be the cheaper side to do the building for the reasons you have stated; that is correct, is it not? A. 347 With the island in its present condition that would be correct. It is possible that some method of detail development might take place which would make it difficult from an operating standpoint to have the roadway on that side, but with the island in its present situation and condition it really is immaterial which side the wing is built.

Q. The map of course shows that the larger part of the island is south of the bridge? A. It appears to be, yes, and I believe that is true.

CROSS EXAMINATION by Mr. Ivins:

Q. (Presenting same) Mr. Safford, do you recognize this map? A. Yes.

H. R. Safford, for Deft., Cross.

349 Q. Will you tell the court what it is, please?

A. That was a sketch that was made at the suggestion of the Squaw Island Development Company to see what might be developed in the way of a siding track connection with the International Bridge Company's track.

Q. The map was prepared by whom, by which company I mean? A. It was prepared by the Division Engineer of the Grand Trunk.

350 Q. What is the relation between the Grand Trunk and the International Bridge Company? A. Well, it has an interest in the International Bridge Company.

Q. Doesn't it own all the stock or all but the qualifying shares of the directors? A. I am not able to answer that accurately.

Q. It controls it anyhow? A. Yes.

351 Mr. Ivins: I offer that map in evidence.

Received and marked "Plaintiff's Exhibit A."

Q. You have been testifying in regard to an estimate that you prepared for constructing the roadway and a footpath across the bridge; I want you to describe that roadway and the footpath that you proposed to construct at those figures?

352 A. Well, the construction of the roadway is the use of the ordinary form of structural steel arm or bracket attached to the side of the bridge and extending outwardly sufficient to give a roadway of 16 feet in width; between these brackets the floor is supported in the ordinary way. An iron railing is put up alongside the outside to protect pedestrians from stepping off the side of the

H. R. Safford, for Deft., Cross.

road. Leading up to the west end of the bridge there will be a graded approach built of earth filling, paved with macadam, protected by a fence and built on a five per cent. grade, that is, five feet in 100; and on the east side, or the Buffalo side, a similar approach will be built along the west side of Niagara street, paved and protected in the same manner. 353

Q. How great a stress did you allow that that roadway would stand? A. I don't know as I understand the question. 354

Q. I am not an engineer and I can't use your technical terms, but I want to know how much of a motor truck loaded with heavy materials would that hold up; on what basis did you calculate in determining the weight of the structural steel you are going to use? You took into consideration the load that this thing is expected to bear, didn't you? A. Yes. 355

Q. And if it is going to bear a heavier load it has to be built of heavier steel and is more expensive proportionately or in some ratio, it may be in squares for all I know. On what basis did you estimate your structure? A. I will have to refer to my drawing to tell you that accurately. (Referring to same). 356

Q. (The Court) He wants to know, as I understand, what load the highway will sustain? A. It was designed to support a moving load of 25,000 pounds on four axles, each spaced in pairs, five feet between each pair and 10 feet between the two adjoining wheels.

Q. When you were making these plans didn't

H. R. Safford, for Deft., Cross.

357 you have in mind running a trolley line across there? A. They were made with the expectation that within the life of the structure, such a load might be put on the bridge.

Q. But if there was no such expectation you wouldn't have had to make the bridge quite so strong, would you; it wouldn't be necessary to have the bridge so heavy? A. Well, at the time 358 these plans were made the automobile trucks had not been developed, of course.

Q. (The Court) Would it require that to sustain it? A. I don't think it would require quite as much metal if a trolley car was not put on the bridge.

Q. So the cost of building it, not allowing for trolley cars, would be less than your estimate? A. I think it would be some less, without having 359 made a calculation to determine it.

Q. The cost of building a roadway and footpath 12 feet over all in width, instead of 16, that would be considerably less too, wouldn't it? A. It would be some less; not considerably less.

Q. In making your calculations you have allowed at certain rates for structural steel put up; isn't that the method? A. Yes.

360 Q. They were the market rates for when? A. They are the market rates at the present time.

Q. Are you familiar with the market rates for the past some little time? A. Yes.

Q. Can you tell how those market rates would compare with the market rates for the same thing—

The Court (Interrupting): Haven't we

H. R. Safford, for Deft., Cross.

got to deal with the present, Mr. Ivins? 361

Mr. Ivins: I think we have got to deal with the time the act took effect. The act took effect last year, and it gave the bridge company six or seven months' time to do the work before the penalties would occur.

Q. Structural steel was considerably less in April, 1915, and through the summer than it is now, wasn't it? A. It was some less, yes.

362

Q. You spoke of the cost of land for these approaches and based your figures on what Mr. Moot called the actual purchase cost; purchased when and by whom and from whom? A. I can't tell you. I can't answer that.

Q. Where did you get the figures? A. It was purchased before I came with the road, and I am not familiar with the rate.

363

Mr. Moot: It was purchased for our office, Mr. Ivins. It is held subject to the demands of this company. Those figures are the actual figures.

Mr. Ivins: I move to strike out Mr. Safford's testimony with regard to the value of that land. He doesn't know anything about it.

Mr. Moot: We will have to prove those figures if you require it. We will show the actual cost of these two pieces of land. We have furnished the figures to Mr. Safford and if they require us I can get the actual date from my office, or I can testify to it myself.

The Court: It may go out. Mr. Moot is going to give you the actual figures.

H. R. Safford, for Deft., Cross.

365 Q. Mr. Safford, are you familiar with the neighborhood of the Buffalo end of the Black Rock draw? A. Yes, as familiar as I can be by being on the ground a number of times.

Q. And with the surroundings? A. Yes.

Q. It is pretty well built up around there, isn't it? A. It seems to be fairly well developed.

366 Q. Now what kind of buildings are there in that neighborhood, is it a residential section or factory section or what kind? A. Why, I have observed industrial plants and residences and railway buildings.

Q. How far is it across Black Rock, across your bridge? A. The length of the bridge you mean, do you?

Q. Yes. A. (Referring to map) Approximately 432 feet.

367 Q. The island part of Squaw island, that part of which photographs have been offered in evidence, is all high and dry land, isn't it? A. No, sir; I wouldn't say it was high and dry land, for I have seen it under water; I have seen portions of it under water.

Q. At flood times? A. Yes.

368 Q. I have seen the water rise over 24 feet in a night at Montreal? A. I wouldn't class it as high and dry land. I wouldn't class any land as high and dry land that is subject to overflow.

Q. How does it compare with the land you have just testified in regard to on the Buffalo side, in respect to the height above water level?

A. It is some lower than that land.

Q. Is there any means of access that you know

H. R. Safford, for Deft., Cross.

of to Squaw island, other than the International Bridge Company's bridge? A. There is a bridge over the canal at Ferry street which it is my impression enables access to be obtained to Squaw island along sort of a levee. 369

Q. That levee is part of the harbor works of the Federal Government, isn't it? A. I can't say as to that.

Q. Do you know whether that Ferry street bridge you speak of is a highway? A. It is my recollection that it is. 370

Q. That causeway or means of access over the Ferry street bridge to the body of Squaw island, will you describe that? Isn't it a sort of a break-water? A. It has been a long time since I went over it.

The Court: Haven't you some way of showing exactly the real situation there? 371

Mr. Ivins: I will have Mr. Taylor on the stand later to explain it.

Q. Do you know anything about the sand or gravel on Squaw island? A. No, sir.

Q. Do you know the tolls that the International Bridge Company now charge for railroad cars taken across this bridge? A. No, I don't believe I can repeat them. 372

Q. Does the International Bridge Company own any engines or cars itself? A. Well, I don't know that I can speak accurately as to that. It operates a motor car now, whether it owns it or not I don't know. I don't know that I have ever had occasion to make an examination as to that.

Q. What kind of a car is that, a freight or passenger? A. It is a passenger motor car that runs between Bridgeburg and Black Rock.

H. R. Safford, for Deft., Cross.

373 Q. Does it run regularly for the carrying of paying passengers or is it operated for the convenience of the companies? A. It runs on schedule.

Q. It takes passengers regularly? A. It takes passengers, yes.

Q. Do you know what the fare is that is charged? A. I understand it is five cents. I have never had to pay it myself and I am not entirely sure.

374 Q. Are you familiar at all with the financial end of the International Bridge Company? A. No, not in detail.

Q. Do you know anything about its earnings? A. No, sir.

Q. Have you in your possession any statement that you believe to be true of the earnings of the International Bridge Company in the last two years? A. No, sir.

Q. Can you tell me who are the officers of the company having charge of the finances? A. I think Mr. E. J. Chamberlain is president.

Q. How about the treasurer; do you know who the treasurer is? A. I think Mr. Frank Scott is treasurer.

Q. And the secretary? A. I believe Mr. George W. Alexander is the secretary.

376 Q. Do you know where those gentlemen reside? A. Yes.

Q. Where? A. Mr. Chamberlain resides in Montreal. Mr. Scott resides in Montreal. Mr. Alexander resides in Detroit.

Q. Do you know where the books of account of the company are kept? A. No, I do not.

Q. (Presenting same). Wasn't this map, plain-

H. R. Safford, for Deft., Cross.

tiff's Exhibit A, prepared by you as the result of negotiations in which you took part, representing your International Bridge Company, with Messrs. Kellogg, Knowlton and Worden in Buffalo? A. This map was prepared at the request or suggestion of one or both of those gentlemen, that some investigation be made to see whether a connection could be made in a practical manner with the tracks of the International Bridge Company, to serve a projected development. 377

378

Q. Do you know anything about the projected development? A. Why, I was given some information by those gentlemen upon it. It was very general, not specific.

Q. Mr. Safford, will you tell me about where on this map the International boundary is? A. I think it is about in the middle of that channel opening or draw span. 379

Q. Somewhere in the draw span? A. My recollection is somewhere in the draw span of the main river bridge.

Q. In the conferences you had with Messrs. Kellogg, Knowlton and Worden do you remember the figures you gave them as the probable total cost of overhead and maintenance of this proposed structure? A. Well, not very distinctly except that I gave them an approximate, a tentative estimate of the cost of maintaining the roadway and employing toll collectors; somewhere around \$4,000 a year. 380

Q. Are you familiar with the water front of Buffalo at all? A. Well, that is a rather hard question to answer. I don't know to what extent you mean as being familiar.

H. R. Safford, for Deft., Cross.

381 The Court: He says at all. I could answer that and say yes.

A. I have been around it.

Q. I want to know if you can tell the court what the situation is in regard to vacant lots on the Buffalo water front available for building factories and mills and industrial developments? A. I don't think I could give you a very specific answer to that question.

382 Q. Can you refer to your map and let us get on the record the dimensions, that is, the length of the Black Rock draw, the length of the embankment across Squaw island and the length of the bridge across the main channel? A. That is not a map prepared by me. The length of the Black Rock draw is 431 feet, 6 inches. The distance across the island between the bridge ends is 1167 feet. The length of the main river bridge is 1895 feet.

383 Q. (Presenting same) I show you defendant's Exhibit 31-A. In the background, in the distance there appears a number of buildings which appear to me to be industrial structures?

The Court: All on the mainland, aren't they, and not in the island?

384 Mr. Ivins: That is so; they border right along the river.

The Court: They are all on the mainland and all show in the photograph except the shacks or boathouses owned or said to be owned by squatters. There are no other buildings on that island. They are all on the mainland. He mentioned that in order to clear it up, because they appear to be on

H. R. Safford, for Deft., Re-direct.

the island, but as a matter of fact they are 385
on the mainland.

Mr. Ivins: That was the reason for men-
tioning it in the direct examination. The
reason I mention it now is I want to show
that they are right along the edge of the
mainland, along the harbor, just 400 feet
across the river.

The Court: You have got the width of
the river and they are right on the edge of
the mainland as I understand. 386

Mr. Ivins: It won't be necessary to go
into the rest of them.

Q. The Black Rock draw in this construction
has abutments which are wider than the present
bridge structure, has it not? A. Yes.

Q. They were built to take care of this exten-
sion if it should be built, the roadway? A. I be-
lieve they are practically wide enough to enable
that roadway to be accommodated, although I
might say that the abutment itself does not have
to be extended to enable this roadway to be built,
because the roadway doesn't rest on the abutment.
The roadway rests entirely on the bridge. 387

Q. The abutment would support the approach
that would be built to carry the road to the bridge?
A. Yes, the back wall of the abutment would help
to do that. 388

RE-DIRECT EXAMINATION by Mr. Moot:

Q. Counsel suggests that steel costs less on
January 1st, 1916, than it does now, and that this
addition to this bridge, whichever side it might be
constructed, would cost less on January 1st, 1916

H. R. Safford, for Deft., Re-direct.

389 than it would now? A. May I interrupt just a minute?

Q. Certainly. A. His question asked me with reference to the price in January, 1915, not 1916.

Mr. Ivins: It wasn't in January. It was along after the passage of this act, in April, 1915.

390 The Witness: I understood you to say January, 1915, in your question.

Mr. Ivins: I meant a little over a year ago at the time this act was passed.

The Court: Why wouldn't it be January, 1916, because that is when the penalties began to run.

391 Q. About what difference would it make in this estimate of the cost of the addition to the bridge that you have given us if you had made your estimate as of the last day of December, 1915, instead of today? A. Well, I don't believe I can answer that without reference to our records to see what the market price of that class of material was of that date. I think there has been some slight increase since that time. I don't think it has been heavy, but I wouldn't attempt to answer that accurately without consulting our records.

392 Q. This is all approximate, this is all an estimate, so I don't care about an absolutely accurate figure, but I want an estimate that will not give the State the worst of it; I want you to be fair to the State? A. If you will let me have a few minutes to consult with my structural engineer, who is a little more familiar with current prices than I am, I can give you that.

H. R. Safford, for Deft., Re-direct.

Mr. Moot: I will stipulate right on the record that the Grand Trunk owns all the stock in the International Bridge Company except the qualifying shares of directors. 393

Q. Are you in a position now, Mr. Safford, to tell us about how much your figures, as a whole, will be cut down if you answered as of the 31st of December, 1915, the last day we had before penalties began to run against us? A. It would be between \$750 and \$800 less than the estimate here given, if the contract had been made at that time. 394

Q. That \$750 or \$800, does that cover everything or just some one thing? A. Just the steel on the bridge itself.

Q. It would be that much less on the steel? A. Yes, sir, that much less on the steel.

Q. Can you approximate it with reasonable closeness as a whole and say, taking that into account as a whole, it would be so much less on one side and so much less on the other if we built it at that time instead of at the present time? A. It wouldn't affect the relative difference. 395

Q. That I appreciate, but I mean on the gross figure that you gave of the cost on one side, which was \$44,778.92, and on the other side, which was \$56,071.12? A. That difference of between \$750 and \$800 would be the same on both sides. 396

Q. That would be for steel alone? A. For steel alone.

Q. Now look at your other items and then tell me how much difference, if you take it back to December 31st, it would make as a whole, how much cheaper it could have been built if it had been finished by that time than it could be if it was finished now? A. Between \$750 and \$800.

H. R. Safford, for Deft., Re-direct.

397 Q. In other words, the other items would remain substantially the same? A. The other items would remain substantially the same.

Q. Then or now? A. Then or now, yes.

The Court: That is for the painting and planking and such things?

A. Yes; those items would remain substantially the same.

398 Q. I suppose that would be substantially true anywhere back in 1915 up to April or May, wouldn't it? A. Yes, sir, I think so. The increase in the price of steel might have started a little previous to the 1st of January; it might have started some time during the fall of 1915. That I can't speak on accurately.

399 Q. You were asked about the difference it would make to not plan for trolley cars, but just for auto trucks and heavy vehicles such as are in use today, and you said it would cost something less? A. Yes, sir.

Q. Can you approximate how much less? A. No, I don't think I should try to approximate that without study.

400 Q. What would be substantially the difference in the load? A. Well, I hardly feel like answering that because the development of the auto truck today has reached a point where I want some opportunity to see what the maximum weights of the cars are that are now being turned out.

Q. In other words, if you were going to build a bridge today, or if you had built it last year you wouldn't build it with reference to the auto trucks of today, but with reference to the development that is apt to occur in the future in auto trucks?

H. R. Safford, for Deft., Re-direct.

A. We would do as we always do in the construction of a permanent bridge, anticipate the load increases that are apt to take place within the life of that structure. 401

Q. You spoke of trolley cars; trolley cars now run right down Niagara street? A. Yes.

Q. And cross the tracks on Niagara street only a few hundred feet from the easterly end of this bridge? A. Yes. 402

Q. So that if you built your foot and vehicle bridge to Squaw island it would only require laying a short distance of tracks to take the trolleys right from the heart of Buffalo right over to Squaw island? A. Yes. It would be very very unwise to construct a bridge of this character, a permanent construction, without anticipating that the maximum street load, the maximum loads which are apt to take place in a street would not be taken across that bridge within its life. 403

Q. Did you provide in your planning or in your figures for anything more than the maximum street load in this addition? A. We did not.

By the Court:

Q. This plan that was prepared in connection with the Squaw Island Development Company only related to the construction of a highway as far as Squaw island? A. That is all. 404

Q. There was some thought in somebody's mind with reference to trolley cars in connection with Squaw island? A. I had better make that clear by saying that the plan that I have referred to, judge, was not made by me; it was made by my predecessor when this bridge was built.

H. R. Safford, for Deft., Re-cross.

405 Q. I say it was made by somebody who thought— A. It was made not with the special view of serving the Squaw Island Development Company. It was made in view of expected conditions some day being reached of requiring a driveway on that bridge, and of course it is the custom always in building an expensive permanent bridge of this kind to build it of such strength so that it can take care of conditions which might be expected to occur in the future.

406 Q. The viaducts and bridges on the main line of a railroad are built to sustain very much larger loads than those now being imposed upon them at the present time? A. Yes.

407 Q. But I understood you to say that it was with reference to someone's suggestion who had in mind a Squaw island development that the plan was drawn showing a highway on it? A. No; I think what was intended by the plans that were prepared was a side track to be connected with the International Bridge Company track to accommodate this supposed sand and gravel bed. This plan does not show that highway arm; it shows a side track only.

408 By Mr. Moot:

Q. That was recently made? A. This was a recent plan.

Q. Prepared in this year? A. I think within the last few months.

RE-CROSS EXAMINATION by Mr. Ivins:

Q. I want to get on the record whether or not you think the construction, if begun on the 1st of June, 1915, would have been cheaper than at the

H. R. Safford, for Deft., Re-direct.

prices as they were on the 31st of December, 1915? 409

A. Why, I said it was my impression there had been some slight increase in steel between the early fall of 1915 and the 1st of January, 1916. I can't support that by actual quotations.

Q. I also want to get on the record what railroad companies connect up and run across the bridge, if you know? A. The Wabash, the Michigan Central and the Pere Marquette.

Q. (Mr. Moot) And the Grand Trunk? A. 410 And the Grand Trunk.

Q. Does the Pennsylvania go one way? A. I don't think you can say that the Pennsylvania railroad really operates over the bridge. There is some reciprocal arrangement about the interchange of cars and that their engines sometimes go over there, but they have no line into Black Rock.

410

411

RE-DIRECT EXAMINATION by Mr. Moot:

Q. Any possible increase in expense between June 1st, 1915, and December 31, 1915, would be covered by a very few hundred dollars in the cost of the addition? A. Why, approximately so. There might be \$150 or \$200 difference.

Q. I say a few hundred dollars would cover it? 412
A. Oh, yes, a few hundred would cover it.

Mr. Moot: Mr. Ivins, I have a telegram from my office stating that the photographs that are identified by numbers were taken April 19, 1915, and the photographs that are not identified by numbers were taken January 14, 1916.

Mr. Ivins: I am willing to stipulate that on the record.

A. Moot, for Deft., Direct, Cross.

413 ADELBERT MOOT, sworn for defendant, testified as follows:

More than 20 years ago either the International Bridge Company or the Grand Trunk Railway Company furnished Moot, Sprague, Brownell and Marey, their attorneys, with the money to buy land both southerly and northerly of the existing International bridge on the Buffalo side of Niagara river. The land on the southerly side cost \$13,200, and the land on the northerly side cost \$26,000; the title being taken in some individual, I think Mr. H. A. Taylor, in the interest of the company.

CROSS EXAMINATION by Mr. Ivins:

Q. Do you remember that? A. I do.

Q. Would you have remembered it without refreshing your memory from that slip? A. Yes, because I remember many of the negotiations and many of the different individuals who held the land, and I remember some of the reasons why they sold cheap.

Q. Can you give us a description of this land? A. Only in a general way, that it was between Niagara street and the harbor northerly and southerly of the bridge at the easterly end of the bridge and running a considerable distance up and down Niagara street.

Q. Have you got any idea of the area contained in it, how much of that land there is? A. Well, I remember only this much on that point, we bought some of that land as low as \$56 a foot front; indeed, I think we bought some of it still lower than that, as I think of it now.

G. A. Ricker, for Pltf., Direct.

Mr. Ivins: I move to strike out Mr. 417 Moot's testimony on the ground that there is nothing in the record or in the evidence to show how much land there was and how much of this land is necessary for these approaches, or what part of such land is necessary for these approaches.

Motion denied. Plaintiff excepted.

Defendant rests.

418

GEORGE A. RICKER, sworn for plaintiff, testified:

Examined by Mr. Ivins:

Q. Mr. Ricker, what is your business? A. 419 Civil engineer.

Q. How long have you been a civil engineer?

A. About 30 years.

Q. Where is your office? A. 110 State street, Albany.

Q. Have you had considerable experience in Buffalo? A. Yes. I was in practice there for upwards of 25 years.

Q. (Presenting same.) Do you recognize this map? A. Yes.

420

Q. Will you describe it? A. It is a sketch plan showing the possible development of Squaw island, with slips and railroad switches connecting with the Grand Trunk railroad.

Q. Did you make it? A. I did.

Q. When? A. In February, 1913.

G. A. Ricker, for Pltf., Direct.

- 421 Q. At whose instance? A. Mr. Kellogg's.
Mr. Ivins: I offer it in evidence.
Received and marked "Plaintiff's Ex.
B."
- Q. Mr. Ricker, would it be practicable to develop Squaw island into a location for industrial development, factories and mills and such, with water and railroad connections?
- 422 Mr. Moot: I object to that on the ground that the possible and practical development of an island like this should not be a sufficient support for legislation to force someone to build a bridge to promote that development.
- Objection overruled. Defendant excepted.
- A. Yes.
- 423 Q. Will you explain to the court just what the general proposition in the proposed development was at the time you made this plan? A. The general scheme of this plan was of slips cut into the island from the Black Rock harbor side at an angle which would permit of ready access for spur tracks from a stem or main line of tracks running along the river front of the island. Connection is made with those tracks, which are on the low level of the island, by tracks connecting with the high level tracks of the Grand Trunk railroad and curving to the level on a trestle, and gradually approaching the ground at the southerly end of the island. The spur tracks leave the main line of the railroad here (ind.) at the high embankment and swing around until they come parallel with the general direction of the river and go down on
- 424

G. A. Ricker, for Pltf., Direct.

I think it was a one per cent grade until they reach the ground level, then the switchback from those tracks had connections into the land beside the slips, and were made as shown. 425

Q. Now in general how much would the slips aggregate in length? A. The longest slip is about 1300 feet in depth, the shorter one is 600 feet in depth.

By Mr. Moot:

426

Q. By depth you mean from the railroad? A. I mean in length.

Q. Not depth of water? A. No, in length of slip. About 4000 feet in length of slips, or approximately a mile and a half of dockage.

By Mr. Ivins:

Q. And approximately how much land is there between these slips for the construction of buildings or warehouses? A. The width between the slips is 400 feet. 427

Q. Each? A. Each, yes.

Q. I notice on your plan to the north of the railroad embankment some spur tracks lead out in a narrow formation; will you explain that? A. Well, that is merely suggested as a possible way of using that land, which is not so located that it can readily be served with a slip. Entrance to that property from the water would have to be from either the river channel or the slip channel. Those switches are laid out there merely to indicate that switches may be swung into that land so as to make it available for freight transfer. 428

Q. Would the plan which was prepared by the witness for the defendant, Plaintiff's Exhibit A, be possible to work in with your plan?

G. A. Ricker, for Pltf., Direct.

429 Mr. Moot: I take it I don't need to keep objecting; my point is already raised?

The Court: Yes.

A. Why, yes, connection could be made with these slips from the tracks as shown on that plan, Exhibit A, but it would not be as convenient or as desirable an arrangement for the service of the larger part of the island.

430 By Mr. Kellogg:

Q. Mr. Ricker, what is the island composed of; you are very familiar with Squaw island, are you not, and its composition? A. Yes. The whole island is a deposit of gravel.

Q. Gravel of a high commercial quality? A. Yes.

431 Q. You have tested it? A. Yes; it is a very excellent gravel, clean and very desirable for use in concrete. Because it has been deposited by flowing water it is washed clean and it is a fairly uniform run of material.

Q. What is there, if you know, about the depth to rock from the surface of that island? A. My recollection is it is about 40 feet. It is some years since I made any—

432 Q. (Int'g.) You have for many years worked in connection with that island in various ways?

A. Yes; I made plans for the development of the island as far back as 1894, and at that time made borings to determine the depth.

Q. At that time there was no channel in Black Rock harbor which carried lake vessels? A. No, sir.

Q. Your docks come in the other way from the

G. A. Ricker, for Pltf., Direct.

river? A. The plan at that time contemplated 433
an entrance to the slips from the river side.

Q. In the river there is a heavy current, is
there not? A. Yes.

Q. How many miles an hour, about seven or
eight?

Mr. Moot: From six to twelve.

A. I placed the maximum current to be about
seven miles through the draw. 434

Mr. Moot: I speak of the official govern-
ment records, they say it is from six to 12.

The Witness: There may be exceptional
times when the current runs as high as that,
but the average maximum would be about
seven through the draw at ordinary stages
of the river.

Q. Black Rock harbor commences now at the
government lock, does it not, at the lower end of 435
Squaw island? A. Yes.

Q. A ship lock? A. Yes.
Q. Capable of docking any of the vessels of
the Great Lakes? A. Yes.

Q. And the water in Black Rock harbor is the
level of Lake Erie, is it not? A. Yes.

Q. And that is how much higher about than the
river at that point? A. Approximately five feet. 436

Q. And the water in Black Rock harbor is
practically slack water? A. Yes.

Q. You are familiar, are you not, with the
other terminal facilities, lake, rail and canal, in
Buffalo? A. Yes.

Q. (Presenting same). I show you a map
which purports to be prepared from the United
States Engineer's maps, showing the entire water

G. A. Ricker, for Pltf., Direct.

- 437 front of Buffalo; do you recognize that map? A. Yes.

Q. Do you know what it is? A. Why, it is a map showing the entire water front of the City of Buffalo, with certain signs indicating industrial development and the present occupation of the lands.

- 438 Q. On this map is shown here Squaw island and the International bridge? A. Yes.

Q. And all the other frontage clear down the river to Tonawanda? A. Yes.

Q. Of the water front in Buffalo suitable for Great Lake terminals can you say roughly how much of it remains in private hands below the Michigan street bridge and Buffalo river?

- 439 Mr. Moot: I don't see how that is competent. If you want to put the map in evidence, won't object to that, and let it speak for itself.

Mr. Kellogg: I will withdraw that question.

- 440 Q. Starting on this map at Squaw island, Mr. Ricker, what is the condition of the American shore, that is, the mainland shore, at the end of the bridge, as compared to the level of the harbor; I don't mean how many feet; is it on the level with the harbor or up in the air? A. The ground of the mainland?

Q. Yes, where the bridge ends? A. Why, it is about 12 to 15 feet higher than the water in the channel.

Q. Now next to that a short distance, almost at the end of the bridge, is Niagara street, is it not? A. Yes.

G. A. Ricker, for Pltf., Direct.

Q. One of the thoroughfares in the City of Buffalo? A. Yes, sir.

Q. And some years ago that thoroughfare was depressed, was it not? A. Yes.

Q. And carried under the International bridge? A. Yes.

Q. On either side of the bridge, to the north and to the south, along the west side of Niagara street are strips of land, are there not, with a retaining wall up to the level of the bridge? A. Yes.

442

Q. And tapering off down into Niagara street on either side of that bridge? A. Yes.

Q. I refer again to this map, Plaintiff's Exhibit A, and call your attention to the design on there in yellow showing a roadway; does that represent, as you remember it, the graded connection with Niagara street over the lands of the International Bridge Company, or controlled by them in some way? A. Why, it appears to represent its approaches, and is marked on this map "roadway."

443

Q. You were living in Buffalo at the time the construction of the grades between Niagara street and the International bridge took place? A. Yes.

444

Q. Is it true or is it not true that at that time these roadways on both sides of that bridge were practically laid out down to Niagara street and up to the bridge, I don't mean the surface, but the general grade up there with the walls on the Niagara street side? A. Well, the construction of the subway was coincident with the building of retaining walls which sustained the strip of land which

G. A. Ricker, for Pltf., Direct.

445 is used for the roadway approaches to the property on the side of that street that was otherwise cut off by the depression.

Q. Could that land be used in any way that you can see as an engineer by the Grand Trunk Railway Company for any other purpose?

Mr. Moot: I object to that as purely speculation.

446

Q. How low under the surface of the International bridge crossing is the level of Niagara street at that point? A. Why, about 13 or 14 feet.

447

Q. And along this whole piece of land here between Niagara street and the river down to the point where this retaining wall falls back into Niagara street again, the level of that land in between there has, on its eastern bounds, which is the western side of Niagara street, a sheer drop right into Niagara street ranging from nothing up to 14 feet or thereabouts in the middle, is that right? A. Yes.

448

Q. Can you tell me from that map how wide that strip is there from the harbor to Niagara street? A. Why, it isn't easy to tell what that is exactly. The drawing is rather rough and the scale is small. It would appear to be from 10 to 15 feet.

Q. Oh, no. A. You are referring to this strip marked "roadway" on here?

Q. Oh, no, I mean the whole strip from Black Rock harbor back to the west line on Niagara street, that whole strip in there (ind.)? A. Well, it is from 100 to 115 or 120 feet.

G. A. Ricker, for Pltf., Direct.

Q. Is there any way that you can see as an engineer by which any of that strip could be utilized for railway purposes and get a track onto it without widening the crossing of Niagara street? 449

Mr. Moot: I object to that. It already appears in the evidence that the Niagara street tracks were depressed in the grade crossing improvements of Buffalo and that the lands as to which counsel is asking were acquired by purchase before that occurred. That being undisputed what has it to do with this case, as to whether the Grand Trunk or International Bridge or anybody else could or couldn't use these lands for anything except bridge purposes? 450

Objection overruled. Defendant excepted.

A. No.

Q. You couldn't make a curve on that land from the Grand Trunk right-of-way or the International Bridge Company right-of-way, could you? A. No. 451

Q. On either side? A. No.

Q. And handle big engines over it? A. No.

Q. So that as far as that bridge is concerned its only possible engineering use is for a roadway or an approach to a roadway to be built on that bridge, is that right? 452

Mr. Moot: Objected to as incompetent.

Objection sustained.

Q. What are the lake and rail terminals at Black Rock or in this part of Buffalo; are there any in the part of Buffalo where Squaw island is?

A. Well, there are some terminals across the

G. A. Ricker, for Pltf., Direct.

- 453 Black Rock channel from Squaw island down the river, just north of the island, where there are industrial plants and tracks serving those plants.

Q. There are a number of industrial plants all along the river front? A. Yes.

Q. Served by other railroads than the Grand Trunk? A. Yes.

- 454 Q. Is there any way which the Grand Trunk, from the level of its bridge, can reach the level of Black Rock harbor on the New York shore without buying a lot of additional land? A. If I understand your question correctly, the Grand Trunk railroad is practically limited to its present occupation so far as the tracks across the island and across Niagara street is concerned.

455 Q. I was also calling your attention to the fact and asking you if it would be possible for the Grand Trunk railway to get down to the level of Black Rock harbor and get docks on Black Rock harbor inside of the New York Central tracks?

Mr. Moot: How does that affect the constitutionality of this law?

Question withdrawn.

- 456 Q. The International Bridge property and rails run only a short distance beyond Niagara street there, do they not? A. I think only a few hundred feet.

Q. Then they stop in a little yard there? A. Yes.

Q. And then into that yard land, connecting right with those rails, are the belt lines of the Lackawanna and Erie and New York Central, are there not? A. Yes.

Q. All connecting with the bridge at that point? A. Yes.

G. A. Ricker, for Pltf., Direct.

Q. And all running around the city through the uncongested part down to the East Buffalo main line, is that right? A. Yes. 457

Q. In other words, with this railroad connection between Squaw island and the main line of New York and the main line of Canada you have a terminal point which can be reached by the Great Lake ships of the largest size and can be reached and must be passed by barge canal boats coming up from Tonawanda or the Erie canal and which is connected through that bridge with three belt lines to the east and on the island itself through running rights over the bridge with the Michigan Central, the Pere Marquette, the Wabash, the Grand Trunk, and I think to some extent, and if I am mistaken correct me, with the C. P. R. R. trains? A. Yes. 458

Q. All traffic lines to the west, not merely to Canada but to Detroit, Chicago and all the west? A. Yes. 459

Q. Do you know any other point in Buffalo that is so connected with the transportation systems of the country and is in private hands? A. No.

Q. At the present time what is the only great terminal point at which the grain and the vast mass of lake products are handled in Buffalo? A. The section indicated on the map by the Buffalo river and the city ship canal. 460

Q. That stream is how wide, do you remember? A. Why, from 200 to 250 feet.

Q. The whole length of it, clear back is lined, is it not, with docks to which these vessels tie up? A. Yes.

Mr. Moot: I don't believe Mr. Ricker

G. A. Ricker, for Pltf., Direct.

461 really means to swear as strong as that.

Q. I will call it as far back as Michigan street and for half a mile east of that it is lined by docks, is it not? A. Well, yes, and further than that; from the mouth of the river up to the foot of Hamburg street, just at the location of the Buffalo Union Furnace the river is lined solidly with elevators and freight houses and terminal properties.

462 Q. Flour mills like the Washburn-Crosby? A. Yes.

Q. And iron factories? A. Yes.

Q. And ore docks? A. Yes.

Q. All those things that are required to handle the commerce of the Great Lakes at the lower end? A. Yes.

463 Q. The vessels are about how wide, do you remember; I mean the big lake freighters? A. Oh, 60 or 70 feet, the larger ones.

Q. They lie on either side of this stream all the way up, do they not? A. Yes.

Q. It is a winding, twisting, dredged out creek, is that right? A. Yes.

464 Q. And when two of these vessels are laid up along opposite sides of that creek discharging their cargo the free space between them is pretty small, isn't it? In other words, the place is extremely congested, isn't that right? A. Yes, it is congested.

Q. Then again every little ways up that river are bridges, are there not, lift bridges and railroad bridges? A. There are several. There are two street bridges within the length that I indicated in the previous answer.

G. A. Ricker, for Pltf., Direct.

Q. That is to the foot of Hamburg street? A. 465
Yes, and then above that there are several railroad bridges.

Q. This territory on the south side of— A. (Int'g). The railroad bridges have not draw spans; the street bridges are draw spans; the railroad bridges are fixed spans.

Q. They have been changing them lately? A. Well, possibly, since I was there. 466

Q. This space between the Buffalo creek, which runs along the lake shore inside, and the lake, is what is called the island, is it not? A. It is generally known as the island, yes.

Q. On this side, on the lake side, between the creek and the lake, inside the breakwater is a great strip of land running to the southern limits of the city? A. Yes.

Q. Can you say what the condition of that land is today? A. As to its ownership or its use? 467

Q. As to its use and its ownership generally?

Mr. Moot: I object to the ownership question.

The Court: Objection sustained as to the ownership.

A. The larger part of that frontage is unused for any industrial or docking purposes. It lies on the beach front back of the breakwater and has not been developed for any commercial purposes. 468

Q. For years that frontage on the lake shore has been a subject of litigation between the railroads and the City of Buffalo, has it not? A. Yes.

Q. It is what is called the Hamburg turnpike litigation? A. Yes.

G. A. Ricker, for Pltf., Direct.

469 Q. About halfway south from the river where it bends back east here— A. (Int'g). From the Ohio street bridge.

Q. (Cont'g.)—to the southern end of the city is what is known as Tift farm, is it not? A. Yes.

Q. That is occupied by the Lehigh Valley railroad as a freight terminal? A. Yes.

470 Q. The westerly terminal of the Lehigh Valley lake trade? A. Yes.

Q. Do you know how large a tract that is? A. I don't recall; it is several hundred acres.

Q. That is all being developed by the Lehigh Valley for their lake terminal business, is that right? A. Yes.

Q. And it is used by them for that purpose? A. Yes.

471 Q. Taking all things into consideration and your knowledge of conditions in Buffalo can you see any reason why Squaw island does not form an ideal site for a lake, rail and barge canal terminal, and a site for flour mills and all sorts of manufacturing concerns requiring those facilities, and warehouses, elevators and all sorts of facilities for the handling of this vast traffic?

472 Mr. Moot: I object to that as incompetent and improper.

Objection overruled. Defendant excepted.

A. If I remember the form of the question, the answer is no. I have proven my faith in Squaw island by investing a good deal of time and money there, for which I never received any adequate return.

Q. That was before my time? A. Yes, that is true. The answer to that is yes.

G. A. Ricker, for Pltf., Direct.

Q. You were in the State Highway Department, were you not? A. Yes, I was first Deputy Commissioner of Highways under John Carlisle. 473

Q. While there, did you test out the gravel taken from the Niagara river in the neighborhood of Squaw island? A. I tested and used a great deal of it.

Q. What gravels in the State of New York did the Public Highway Commission, when you were there, permit to be used in cement work in the state highways? A. Only washed Niagara river gravel. 474

Q. Referring to this plan of improvement on Squaw island, made for the Squaw Island Freight Terminal Company, Inc., by you, the plan contemplated doing what with the surface of the island? A. Why, bringing it up to a level as high as was necessary and permissible for docks, building on the Black Rock harbor side, and at the same time leaving sufficient head room for vessels under the tracks of the Grand Trunk railroad. 475

Q. And that height was about four feet above the level of Black Rock harbor, was it not? A. No, my recollection is it was about seven feet above the level of Black Rock harbor. 476

Q. In other words, those slips to be carried in here would of course be at the level of Black Rock harbor and not at the level of the river? A. Yes.

Q. And the docks had to be a certain level? A. The docks needed to be six or seven feet or thereabouts above the water level. The water in

G. A. Ricker, for Pltf., Direct.

- 477 those slips was of course the height of the water in the Black Rock harbor, from which they were run in.

Q. And that excavation of these canals and of the land in here (indicating) in front of the island to the harbor would have made all that filling, is that right? A. Yes.

Q. According to your calculation? A. Yes.

- 478 Q. Black Rock harbor is not a slip, is it; vessels are not allowed to tie up anywhere in Black Rock harbor, in the channel of Black Rock harbor back to Lake Erie, are they? A. I don't know the regulations about that.

- 479 Q. That channel starts at Lake Erie and is a Government channel? A. It is a Government channel maintained at a given width throughout and would be subject to the rules of the Government as to such channels; what they are I am not familiar with.

- 480 Q. Do you remember the width and depth of that channel? A. 23 feet in depth and my recollection is that the channel is 200 or 210 feet wide, and the channel lines do not extend to the dock lines; the abutting dockage would have to maintain its own depth of water to the channel, so that the channel is constructed for channel purposes.

Q. In regard to the connection of Squaw island with the mainland via the sea wall strip and Ferry street, will you describe that connection; is there any roadway there? A. That is nothing more than a wall, a breakwater, which separates the Black Rock harbor channel from the Niagara river; it is a dam because most of the distance the water inside is probably four to five feet

G. A. Ricker, for Pltf., Cross.

higher than the water outside, and it is a narrow place on which there is a rather ragged, dangerous footpath, but there is no driveway or other means of passage. 481

CROSS EXAMINATION by Mr. Moot:

Q. The water in Black Rock harbor comes from the upper end of Niagara river where it begins to leave the lake and go down the river? A. Yes, in back of what is known as the north breakwater. 482

Q. And there for this Black Rock harbor there is an intake, you might call it, to the river and the water flows along down back, confined by this brick wall that is between the river and the harbor; it flows along down inside of that brick wall on the one side and the land on the other, making a channel or harbor which is called Black Rock harbor? A. It is a wall, but it is not a brick wall. 483

Q. It is a wall? A. It is a wall; it is not a brick wall.

Q. To handle the thing there is a lock necessary in the course of your Black Rock harbor there to lock vessels through, etc.? A. Yes.

Q. That part of the stream that makes this Black Rock harbor originally was a natural part of the river and had its flow back into the river until engineers fixed it so as to make a harbor out of it? A. Yes. 484

Q. In other words, it is a part of Niagara river which the government has impounded, so to speak, and improved for harbor purposes? A. Well, it was first done by the State for the improvement of the Erie canal.

1924

G. A. Ricker, for Pltf., Re-direct.

485 Q. And then when the Government took it over and got the deed that has been put in evidence here and went on and improved it further by these appropriations that are in evidence, as I say, to make it all kind of a harbor? A. Yes; it was a State waterway with a guard lock connecting the Erie canal just below where the International bridge now stands.

486 Q. By a State waterway you mean that the State used it in the beginning to feed the Erie canal through this guard lock? A. Yes; well, it was the Erie canal as I understand it.

Q. When the State turned it over to the Government by this deed that has been put in evidence then the United States Government made these improvements making Black Rock harbor as we call it? A. Yes.

487

RE-DIRECT EXAMINATION by Mr. Kellogg:

Q. The new State barge canal, where does it end? A. Tonawanda.

Q. That is how far below this point of Squaw island? A. Oh, between four and five miles; I am not sure but what it is a little more than that; I guess it is. The canal barges are intended to come up the river and come through this lock because the section of the old lock from Black Rock to Tonawanda has not been improved.

Q. In other words, on their way to Buffalo and the present harbor they will have to pass by Squaw island in this channel? A. Yes.

R. W. Lytle, for Pltf., Direct.

ROBERT W. LYTLE, sworn for plaintiff, testified: 489

Examined by Mr. Kellogg:

Q. Mr. Lytle, you live in Buffalo? A. Yes, sir.

Q. And are and have been for many years a practicing attorney in Buffalo? A. Yes, sir. 490

Q. During that time you have been a boatman also, have you not? A. Yes, sir.

Q. And have known and are familiar with the conditions at Squaw island? A. Yes. I have been the owner of a boathouse on Squaw island for about 21 years and got quite familiar with the situation there.

Q. Just tell the court what you know about the use of that island by boat owners and by the public and all that during that period of time and coming down to the present time? A. The island is conveniently located for boating and fishing purposes. I built a boathouse there in 1894 I think, or 1895, at a cost of four or five hundred dollars, and purchased a launch, a small boat, and we have used that for recreating purposes for the last 21 years. There are about 100 to 125 boat-houses on the island, located on the west and east side of the island, a great many of them have gasoline launches, most of them have row boats, and they use the island as kind of a headquarters for boating and fishing and general recreation. On the west side of the island, north of the International bridge, there are about 45 to 50 boat-houses, over half of them have channels and these 491 492

R. W. Lytle, for Pltf., Direct.

- 493 channels are storing places for gasoline boats that cost anywhere from \$100 to \$3,500. The boathouses themselves range in cost from about \$25 to \$1,500. On the east side of the island, north of the International bridge, there are about six or eight boathouses. Mine is located in that locality, and they are used for the same purpose. On the east side of the island, south of the International bridge, there are about 30 to 40 small boathouses, some of them have row boats, others have sail boats, and I think about probably two-thirds of them have gasoline launches. Part of the island north of the International bridge, or where the embankment connects the harbor bridge with the river bank is practically level ground and is used for baseball and for football. Years ago when we could get across the lock there conveniently—

- 495 Q. (Indicating.) Explain that, about that old passage? A. Five or six years ago and before that time we found little or no difficulty in going across to the island. We passed over what we called the old canal lock; that lock was at the foot of Bridge street; it was a small lock, about 125 or 150 feet long, and about 40 feet wide, and had two gates, and those two gates had walkways on the gates; you could walk back and forth at any time, night or day; one of the gates was always closed. We had constant access there. After the new ship lock was built they dredged that entire lock out, and since that time we have had no convenient nor safe access. One means of access is over Ferry street and over the Ferry street bridge, but that is

R. W. Lytle, for Pltf., Direct.

about a mile and a quarter or a mile and a half 497 from the greater part of the boathouses, they being located mostly north of this embankment that connects the two sections of the bridge. Another access is over the International bridge itself, the part that crosses the harbor. In crossing that bridge we cross between two railroad tracks on a narrow plank about eight or ten inches wide, and it is dangerous in my judgment. The other access is over the lock itself, over the new United States lock, but in going over that lock we go about three or four thousand feet out of the way, we have to pass way down the lock to the gate and then cross the lock and then back up on what we call the arms, these long extensions, I have forgotten the technical name for them, we have to walk on the top of that wall back to the island and then around. There is a small ferry 498 that runs from the foot of the bridge across where the old lock used to be; that is a small scow about six feet wide and about 20 feet long, and it has a stairway built right from the scow; the stairway is about nine feet high in order to accommodate the passengers. You have to step from this wall to the stairway and then walk down the stairway into the scow; the whole thing 499 is in unstable equilibrium all the time and is in constant danger of turning over. That scow of course is run only during pleasant weather, and when there is ice or high wind or high water the ferry ceases operations. 500

Q. Mr. Lytle, some of the people on the island live there the year around, do they not? A.

R. W. Lytle, for Pltf., Direct.

- 501 Yes. On the east side of Squaw island, north of the bridge, there are eight or nine dwellings occupied the year around by families. On the south side, from the bridge down to the head of the island, or the south end of the island, there are about 12 or 14 more dwellings, and they are all occupied the year around. Some of those families cross the harbor at Ferry street and others cross the International bridge by permission of the International Bridge Company; some go across in small row boats; others cross on the ice in the winter time, when the ice is thick enough and safe enough, and as I say during January, February, March and April the Government allows them to cross on the lock.
- 502

- Q. While in Niagara street immediately across the bridge yard is one of the main double track trolley lines of the city? A. Yes.

- 503 Q. And the moment you hit Niagara street you can go anywhere you want to? A. Anywhere you want to, north or south.

- Q. Wasn't there a house on the river side too, quite a large place, that was occupied the year around? A. On the west side?

- 504 Q. Yes. A. I don't know; I have seen families over there quite early and quite late; as early as April and as late as December, but whether they stayed there during January and February I don't know.

- Q. Aside from those on the Government grounds, here on the edge of the Government lands here do you know anybody on the island that is a squatter, that doesn't have a lease and

R. W. Lytle, for Pltf., Direct.

pay rent? A. No; all that I know of pay rent; 505 some to my own knowledge pay rent and they all tell me they pay rent. I have that from hear-say. I pay the rent for one or two of them; I pay it to you or to your office, and I pay for myself.

Q. You know we give you a lease from year to year subject to cancellation, a written lease, which you sign for \$1 a foot front? A. Yes; 506 for the past 10 or 12 years we have been paying rent for our land so much a foot per year. There are several families over there that have children, and it is a difficult thing for those children to get back and forth to go to school, a positively dangerous thing in bad winters.

Q. What happens over there when there is a fire? A. When we have a fire over there usually the buildings burn down. It is very difficult matter to get the hose across now since these high walls have been put up there. 507

Q. What do they do about the hose? A. Since the lock was built?

Q. Yes. A. I think they take it across the harbor.

Q. Do you know? A. I don't know; I wasn't there the time the last fire occurred. 508

Q. It is all in the City of Buffalo, right opposite the busy part of the city? A. Yes, the island is in the City of Buffalo.

Q. These boathouses, many of them are owned by clubs, are they not? A. Yes, sir. The Launeh Club owns a boathouse just north of the International bridge, on the east side of the is-

R. W. Lytle, for Pltf., Cross.

509 land, the Pastime and the Welcome Club, the Home Club, the Batcheller and the Bison City, and there are some others that I can't recall.

Q. These clubs have quite a considerable number of members, have they not? A. Yes, they have a membership of from 4 to 16 or 18 or 20. The Bison Club I think has a membership of about 16 or 18 men.

510 Q. What kinds of boats have they, are some of them valuable boats or just ordinary skiffs?

A. I only know from the general appearance of them, and what is said. Mr. Hager had a fine yacht there about 35 or 40 feet long; he said it cost him \$3500 or more, and it looks it. Mr. Gunnell has a fine boat there.

511 Q. Mr. Gunnell is a public accountant, is he not, and a man of prominence in the town? A. I don't know whether it is that Gunnell or not.

Q. A number of highly respectable people have places over there and enjoy the facilities which that island affords? A. Yes, Attorney Wilson has a boat on the east side of the island above the bridge that cost about five or six hundred dollars. Mine cost me \$500, and there are 75 or 100 better boats than mine and must have cost that much or more.

512 Q. The sport of motor boating is very largely developed in Buffalo, is it not? A. Yes, it is.

Q. There are a very large number of motor boats there? A. Yes, sir.

CROSS EXAMINATION by Mr. Moot:

Q. You are a lawyer with an office downtown, where most lawyers' offices are to be found,

R. W. Lytle, for Pltf., Cross.

near the City Hall? A. Yes, on the corner of 513 Huron and Franklin.

Q. That is near the City Hall? A. Yes.

Q. That is about how many miles southeasterly from the location you are speaking of, Squaw island? A. Do you mean the location of the bridge?

Q. From the center of Buffalo, where the City Hall is, and where the lawyers' offices are? A. I should say about three miles or three miles and a half.

Q. You think Squaw island is about three or three and a half miles from the center of the city? A. I say from the City Hall, I should say by the Niagara street line about three miles or three miles and a half.

Q. There are no streets on Squaw island? A. No, sir.

Q. No roadways? A. No, sir.

Q. And never have been any to your knowledge? A. There was a roadway one time that went across the island to a ferry that plied between Squaw island and Bridgeburg, but that has been abandoned for the last 25 or 30 years, I guess.

Q. You remember as a boy there was such a thing as a roadway then that made the connecting link between the ferry that went from the west side of the island to Canada? A. Yes.

Q. And from the east side of the island to Buffalo? A. I don't remember ever seeing that ferry, but there was a roadway that was there for that purpose.

R. W. Lytle, for Pltf., Re-direct.

517 Q. As the connecting link between those ferries? A. Yes.

Q. Of course a great many people have gone back and forth between Buffalo and the island that have used row boats? A. Yes, sir.

Q. That has been a common method of going back and forth between the island and Buffalo ever since you can remember? A. Yes; we use our row boats to get water.

518 Q. And usually one or more energetic boys or young men are there with row boats to row you across if you are willing to pay them a tip for doing it? A. They weren't very abundant when we wanted them.

Q. There is usually somebody there with a boat to take you across? A. Why, in the last four or five years it has been a difficult matter to get across. This wall nine feet high makes it a difficult matter to get over the wall into a boat. That is where the trouble is.

Q. That wall was put there by the government making this Black Rock improvement? A. Yes, sir.

520 Q. These changes that the government made in making this Black Rock improvement made this a difficult thing, going back and forth between Buffalo and the island? A. Yes, sir, I think that is a fair conclusion.

RE-DIRECT EXAMINATION by Mr. Kellogg:

Q. Could you give any estimate of the number of people that you have seen use that island in a single day? A. Well, the biggest crowd I ever

R. W. Lytle, for Pltf., Re-cross.

saw was the time they had a right good baseball game there between the Travelers of Southeast Buffalo and the Black Rivers of North Buffalo. They are two good clubs and they played a game there and I should judge there were 800 to 1000 people there. The next biggest crowd, I saw there was the time when the Bison Club had a fair there and they had games; they had a greased pig and a few other entertainments and a lunch, a wrestling match, running races, and one thing and another; I should say there was a crowd there that day of 1000 or 1200. When the flowers are in bloom, and there are lots of flowers on the northern part of the island, it is no uncommon thing to see men and women and families over there gathering flowers, maybe 50 to 150 or 200 on Saturdays and Sundays.

522

Q. There have been considerable gatherings of people there right along during the summer months on the island? A. Yes; they used it very much as a park through the warm weather, that is, before this wall was built, before the lock was taken out, when we had access.

523

Q. You mean that stopping the access the number of people and number of boathouses and everything else is very much less than it used to be? A. It broke up all the ball games and pretty much all the other patronage.

524

RE-CROSS EXAMINATION by Mr. Moot:

Q. That is, this government improvement, of putting this wall over there, so they couldn't get there any more, it stopped their going there? A. By putting the wall in there and dredging out the lock.

R. A. Kellogg, for Pltf., Direct.

525 Mr. Ivins: The map showing the proposed development on Squaw island and the actual street layout of the land opposite on the Buffalo City side is offered in evidence by consent.

Received and marked "Plaintiff's Exhibit C."

526 Mr. Ivins: I offer in evidence this large map that Mr. Ricker referred to when being examined.

Received and marked "Plaintiff's Exhibit D"

Wednesday, June 21, 1916, 10 a. m.

527 RALPH A. KELLOGG, sworn for plaintiff, testified as follows:

I reside in the City of Buffalo and have practised law there and been interested in various business projects for some 25 years. About 10 years ago I was employed by Mr. Bickford of Evarts, Choate & Sherman of New York, one of the 11 trustees who owned the entire stock of the Niagara River Hydraulic Company, which was a corporation that had owned Squaw island in the Niagara river for many years. I was to take charge of the island, keep squatters off of it, and negotiate for its sale in whole or in part. From that time to the present time I have been closely and intimately connected with that property, having interested in it a friend and client of mine,

R. A. Kellogg, for Pitf., Direct.

Mr. Daniel E. Knowlton, the owner of the Knowlton Warehouse Company, and president and chief owner of the Buffalo Cold Storage Company, and therefore a terminal man of wide experience; he and I and three friends obtained an option, a contract, for the purchase of Squaw island. That was some five years ago. We then employed Mr. Ricker to make a plan for a terminal, like, rail and barge canal terminal on that island, together with sites for manufacturing, on the lines of the Bush terminal in Brooklyn. He made the plan which he testified to yesterday, and also prepared specifications and estimates of the cost of that complete project, as shown on that plan. Having obtained that and looking into the matter from every standpoint we could, we formed a corporation which was called the Squaw Island Terminal Company, Inc., to take title to that property and develop it along those lines. I have here a certified copy of the certificate of incorporation of that company, and I should like to put that in evidence.

Received and marked "Plaintiff's Exhibit E."

The Witness: During the time that I was acting as the agent for the owners of the island we had discovered that the lands within the harbor line along the river front of Squaw island contained a constantly returning body of valuable concrete sand and gravel and grit, and I leased the exclusive right to take that sand, grit and gravel to a concern that did business in Buffalo, re-

R. A. Kellogg, for Pltf., Direct.

533

ceiving a royalty for the company. I think it was seven cents a cubic yard minimum, 100,000 yards per annum. In connection with the men who owned that company, Mr. Hyman, Mr. Knowlton and I went to Montreal and saw vice president Kelly and Mr. Hayes, who was then in charge of traffic on the International bridge and for the Grand Trunk railroad, and showed them our plans for the terminal as made by Mr. Ricker, and told them our purposes, and then explained that we wished a switch and road connection with the island so that we might handle from the island this sand and grit and gravel. They promised to—

535

Mr. Moot (Int'g): I submit that the negotiations between your company and these companies in Montreal, in view of every ethic of law, would be excluded here. That you had negotiations I think is quite competent, but as to the details to those negotiations I suppose they are not competent, I assume you gentlemen talked with great freedom, without any expectation on either side that it would be regarded as testimony in a court of justice.

536

Mr. Ivins: It seems to me in so far as any statements made by the defendant company can be considered as admissions in this action they are admissible here.

The Witness: If I may, as a witness, state so far as that transaction is concern-

R. A. Kellogg, for Pltf., Direct.

ed I don't think it is necessary to go any further. We made that demand of them for a railroad connection.

Q. (Mr. Moot): Just give the date of that, or about the date? A. That was several years ago, I think it was either in December, 1912, or January, 1913; I am not accurate at all about it.

Q. (Mr. Moot): That is near enough. A. This sand and gravel business as then and now conducted in Buffalo involves the pumping of the gravel from the river and its transportation in a boat to a point on the mainland at which there is a switch and car service can be obtained. The plan which we then had and now have was to run a slip into the north end of the island, build a washery at that point, use dump bottom scows which could make instead of one trip a day three per boat, and with rail connection and road connection the cost of recovering and delivering that material would be enormously reduced. Squaw island furnished the only place in Buffalo at which the gravel, sand and grit might possibly have railroad transportation facilities. Thereafter we made a number of efforts and had numerous negotiations with people, large concerns who were coming to Buffalo or wanted to, with reference to terminal facilities on this island. We could not seem to break the circle. The railroad wanted traffic first, the manufacturers who were interested in going on the island wanted railway facilities and a roadway first, and the bond people wanted both first, and for three or four years we

538

539

540

R. A. Kellogg, for Pltf., Direct.

- 541 went on with these negotiations in that way, passing around and around in a circle. Finally we determined that there was one traffic which we could control and own and that was the sand and grit and gravel business, so we bought the island in the name of the Squaw Island Development Corporation. The other corporation which we had formed could not issue any stock or give any bonds and mortgages until the approval of the Public Service Commission was obtained, being a Public Service Corporation. I have here the deed from the Niagara River Hydraulic Company to the Squaw Island Development Corporation; I should like to put that in evidence.
- 542

Received and marked "Plaintiff's Exhibit F."

- 543 Q. (Mr. Moot): What is the date of the deed? A. The date of the deed is February 1st, 1915.

- Q. (Mr. Moot): And it is recorded when? A. Recorded in Erie County Clerk's office in Liber 1316 of Deeds, at page 123, February 6, 1915. That corporation gave back a purchase money mortgage, which I have a copy of here if you want to see it, Mr. Moot. It secures the payment of \$500,000 in bonds at the expiration of 25 years, with five per cent. interest in the meantime, and gives the right to release certain portions of the island on certain payments, and also the rights under certain conditions to excavate the sand, grit and gravel. We had the island bored under my direct supervision; I think we bored 21 holes, and found that it was composed,
- 544

R. A. Kellogg, for Pltf., Direct.

with a small exception in the middle, of the finest grade of sand, grit and gravel of commercial material to a depth of about from 40 to 50 feet. A rough calculation of the contents of the island as near as we could reach it is that the commercial gravel contents of that island are between four and six million yards; a minimum of four and a maximum of six. We also determined, by the fact that it has been taken out for many years from lands under water within the harbor line of Squaw island, that the annual accretion ran about 100,000 yards, and perhaps a good deal more.

545

546

Q. (Mr. Moot): How many tons is that?
A. You can add 50 per cent.

Q. (Mr. Moot): That would be 50,000 tons
a year accretion? A. No, 150,000 tons.

547

Q. (Mr. Moot): 200,000 tons? A. I said the accretions we knew were 100,000 yards a year, and 100,000 yards is 150,000 tons; that is, each yard weighs about 3000 pounds. Having no rail or road connection on the island we leased, the Squaw Island Development Company did, a piece of land on the mainland at Ferry street, and secured a small plant, and in the season of 1915, beginning in June and going around to the following May, we took out, handled and sold our entire capacity, which was some 66,000 yards, or about 100,000 tons. This spring we have organized, for certain reasons that possibly exist, a separate corporation called the Squaw Island Sand and Gravel Corporation, of which I have here the certificate of incorporation, and would

548

R. A. Kellogg, for Pltf., Direct.

549 like to put that in evidence to complete this list.

Received and marked "Plaintiff's Exhibit G."

550

The Witness: The Squaw Island Development Corporation then made, on the 1st day of February, 1916, an instrument which I have here, whereby it grants to the Squaw Island Sand and Gravel Corporation exclusive rights to take sand, grit and gravel from Squaw island within the provisions of the mortgage and from lands under water within the harbor line, and also a lease of the north 10 acres of Squaw island for a plant; also a right of way to connect with the International bridge or railroad, a roadway, and for that the Squaw Island Sand and Gravel corporation agrees to pay the taxes on the island and an amount equivalent to the interest on the purchase money mortgage, \$25,000 per annum. There are various other provisions in the instrument, which you might like to see, Mr. Moot.

551

Q. (Mr. Moot): Is there anything there that is questionable; we won't stop to examine it; there isn't anything there that is questionable, is there? A. Not at all. It is simply as I say a grant of all this gravel business, our plant and everything else to this company, with a place on the island to do business and their agreement to do business. I would like to put that in evidence.

Received and marked "Plaintiff's Exhibit H."

R. A. Kellogg, for Pltf., Direct.

Mr. Moot: Of course I assume a good deal of this perhaps isn't competent, but as this is a case in equity before your Honor without a jury, while I can't keep objecting I don't want to waive my rights. 553

The Witness: This sand and gravel corporation issued its securities and obtained from the stockholders \$150,000 with which to do this business, on top of all the plant which we already had, and it now has all or the most of that money in bank awaiting the building of these plans. The equipment which this company has already bought in the way of a boat, trains, etc., has a capacity for the current year, operating on the mainland on our leased yard, of approximately 125,000 yards; it is producing at that rate every day. 554

Q. (Mr. Moot): That is cubic yards? A. Cubic yards. Add 50 per cent and you get the tons. That company has obtained plans complete for its dock, for its slip and washery on the island from competent engineers and have had expensive efforts to find the best methods, and is also waiting to go on with that project under the most advantageous circumstances on the island; it is waiting for a rail and road connection with the International bridge. The plant as planned will have a capacity of about 300,000 yards per annum. In January of 1915, Mr. Knowlton and I had another conference, representing the company about to be formed to take over this island, with Vice President Kelly, Vice 555

P. A. Kellogg, for Pltf., Direct.

557 President Dalrymple, and Mr. Safford, chief engineer of the Grand Trunk and of the International Bridge Company, with reference to the building of this roadway and switch. At that time those gentlemen—do you object to this, Mr. Moot?

Q. (Mr. Moot): Mr. Kellogg, you say that was in January? A. January, 1915.

558 Mr. Moot: I understood you to say 1916.

The Witness: No, 1915, just a short time before this bill was presented to the legislature, as I remember it.

559 Mr. Moot: Even then I don't see how the details of the negotiations between these parties for a roadway and switch which preceded the passage of this law can furnish any foundation for a penalty, as it is admitted in the opening that it resulted in no agreement, and if it did the agreement itself would be the only competent evidence, if that would be competent, for the foundation of a penalty. I think I ought to raise this point.

560 The Court: Objection sustained I don't think we ought to take that up. I think that one statement that they have had several negotiations from that time to this will be all that is necessary.

The Witness: There is one other point, your Honor, and that is this, I don't know whether it is competent or not. We made an offer to these gentlemen to build this

R. A. Kellogg, for Pltf., Direct.

bridge and to guarantee the tolls. Those 561
are the points that I wanted to bring out at
that time.

Mr. Moot: Of course that would ne-
cessitate going into all the details to see
whether it was a reasonable offer or not.
As a common carrier, and of course the
bridge is a common carrier of cars and
not a traffic in the ordinary sense,⁵⁶² the
common carrier obligation would only be
to carry traffic in vehicles and passengers
at the most. That is the most that could
be claimed in the broadest conception of
the franchise. I don't see how the de-
tails of the negotiations can be competent
as a basis for the recovery of a penalty.

Mr. Kellogg: My point in the matter
is simply this, your Honor, the impression
that was left here, that we the owners of
Squaw Island, are trying to make this
Grand Trunk Railroad go to an expense
without any recourse. We have proposed
in writing and orally, I have done it my-
self for this company, to either build such
a roadway as we wanted at our expense, or
to guarantee what these gentlemen say will
be the cost of maintenance and interest at
six per cent, etc.

After further discussion Mr. Kellogg
said:

I would like, if I might, to ask myself
that one question and have it objected to
and passed upon. I will ask myself this
question:

134

R. A. Kellogg, for Pltf., Direct.

565 Q. Did you in January or the early part of February, 1915, go with Mr. Knowlton to Montreal and there meet Mr. Kelly, the vice president of the International Bridge Company, and also vice president of the Grand Trunk Railway, and Mr. Dalrymple, vice president of the Grand Trunk Railway in charge of traffic, and Mr. Safford, chief engineer of the International Bridge Company and of the Grand Trunk Railway, and offer to those gentlemen to pay the cost of the roadway on the Black Rock harbor span and approaches thereto sufficient for the purposes of the owners of Squaw Island?

566

Mr. Moot: I don't object to the form of the question, your Honor. That might be objectionable, but I object to the substance broadly on the ground that it is incompetent and improper here, because whatever the negotiations and whatever the offer that preceded the legislation that resulted in the act which is the basis of this action for a penalty, this action for a penalty must rest on whether or not we have violated the act by acting or omitting to act contrary to it. We cannot be held down by any offer made by these negotiating parties before the legislature passed the act.

567

568

Objection sustained. Plaintiff excepted.

Q. Have you since that time and in or about the month of April, 1916, repeated that offer and also offered to guarantee in any form required by the railroad that the tolls upon said roadway

R. A. Kellogg, for Pltf., Direct.

should equal six per cent on the investment, the 569 maintenance charge and the expense of operating toll gates, etc.?

Mr. Moot: Again I waive my objection to the form of the question, and object to the substance on the same grounds as before, and upon the additional ground that the summons in this action bears date January 11, 1916, and this action was in fact commenced by the service of that summons and complaint January 13, 1916, consequently the action was ripe at that time, and what was since done by these parties in negotiations with each other would neither make a cause of action on one side nor a defense on the other.

Objection sustained. Plaintiff excepted.

The Witness: There are no squatters on Squaw Island and have been none for seven years. Every person on the land formerly owned by the Niagara Hydraulic Company, and now owned by the Squaw Island Development Corporation, is there under a written lease, paying rent to the company. I personally know those facts to be true, having had charge of the matter.

570

571

572

By Mr. Ivins:

Q. Have you made any estimate of the probable number of cubic yards of sand and gravel that will be moved across the Black Rock draw by the sand and gravel company if the highway

R. A. Kellogg, for Pltf., Cross.

573 arm is constructed and switching connection to the railroad made? A. I think I have covered that point, Mr. Ivins. Before you came in I think I covered that whole point.

574 Q. Yesteday Mr. Safford testified with regard to stating to you an estimate of the cost of carrying, I mean overhead charges and operation charges, this proposed highway arm, but he couldn't remember very clearly what his estimate to you had been; do you remember that? A. Yes.

Q. Will you state it? A. \$3300 per annum.

CROSS EXAMINATION by Mr. Moot:

575 Q. Do you remember what items were included in that \$3300? A. The item of interest on the cost of building the approach from Niagara street and the arm of the bridge itself, and the roadway on the International Bridge Company's lands on the Squaw Island side; the annual maintenance cost and the wages of two men, a night and a day man, to act as toll keepers, as I remember it.

576 Q. Was there any talk about what those two men would cost, what their salary would be for 12 hour shifts? A. As I remember it in detail, Mr. Moot—

Q. (Int'g). No, just that. A. I think so, yes. My memory is stronger as to the total rather than in detail.

Q. What was the daily or monthly wage of each of those men to be? A. I think it was \$50 a month, I think \$1200 a year was the amount

R. A. Kellogg, for Pltf., Cross.

allowed for those two men. That is my memory 577
of it.

Q. It wasn't \$60 a month? A. I think it was
\$1200 per annum.

Q. You know very well you couldn't get them
for that these days, or even last December, don't
you? A. No.

Q. Don't you know that farmers are paying
from two to three dollars a day, and ordinary
highway workers get from \$2.50 to \$3 a day, and
that the Lackawanna Steel Company is short
from 500 to 1000 men all the time, although they
hire 1500 new men a month, because the men drop
out and all that, and that they pay from \$7 to \$9
a day for their expert men and they pay \$2.75 for
the most ordinary laborer; don't you know facts
of that character? A. Yes, I know that men
are paid such figures by the day. I know that
men can be hired for very much less by the
month. 579

Q. Men to do daily work and operate 12 hours
a day and board themselves and find their own
dwellings and all that, \$60 a month would be a
very reasonable allowance for such men, even last
December or October, wouldn't it? A. A. I
said, Mr. Moot, I cannot definitely state whether
it was \$50 a month or \$60; it was around that
sum. 580

Q. Well, that would bring the two men, if it
is two men, anywhere from \$2400 a year up to
nearly \$3000 a year alone for maintenance? A.
I don't see it that way, Mr. Moot. \$60 a month
is \$720 a year.

R. A. Kellogg, for Pltf., Cross.

581 Q. You are right, from \$1200 to \$1500? A. From \$1200 to \$1440.

Q. Was anything said about the cost of the land under these approaches or the interest on the cost of the land? A. There was not.

Q. Was anything said about the cost of the steel for these approaches or the interest on the cost of the steel? A. Certainly, yes, for all work done, not anything for the property.

582 Q. Not anything for the property? A. No.

The Court: Was there any item of lighting the driveway at night?

Q. Was there any item for lighting the driveway? A. I don't think so, I don't remember any such item.

583 Q. There was talk that there would have to be men there so as to keep it open all the time if a roadway was put on there? A. Not by us, but by the Grand Trunk officials, yes.

Q. And you recognized there would have to be lights if it was kept open nights? A. I should think that would be necessary.

Q. Of course you have made no estimate of what the lighting would cost? A. I have made no estimate at all.

584 Q. Was there any talk or any figures about what the depreciation and the percentage of depreciation a year would be for the steel and for the flooring and all that? A. As I remember those items were both figured by the officials. I didn't make the figures. They simply submitted them.

Q. Was there anything said about what the

R. A. Kellogg, for Pltf., Cross.

taxes would be? A. No, not that I remember. 585

Q. If the land on one side cost \$26,000 and on the other side \$13,000 and you were to figure the interest on those items alone it would make a big addition to this cost of handling the thing, would it not? A. The interest on \$26,000 would be a considerable sum, yes.

Q. Or even on \$13,000? A. Yes.

Q. Were any items of that sort mentioned? A. Not mentioned in any way. 586

Q. Was anything said about painting or the annual charge for painting? A. Why, I assumed that that was in their items of maintenance, I don't know.

Q. Do you remember whether anything was said about it or not? A. No; they didn't go into those details with me at all.

Q. So it is rather by way of inference rather than by express statements that you infer that their estimate covered everything? A. Well, they made the statement to me as to what the total would be, and I have given that total; that is all. 587

Q. Whether that total covered everything or just covered figures that they would be willing to contract with you or you didn't quite ascertain? A. No, I did not ask them what the particular detail of these figures was beyond a mere casual conversation on the subject. 588

Q. Now this matter of squatters; all the people on the island then for the last seven years have been tenants of your company? A. I said all the people on the lands that we own. There are some lands along the island owned by the

R. A. Kellogg, for Pltf., Cross.

- 589 United States Government, and there may be some squatters on there; I don't know whether they pay anything or not.

Q. Leave out what the United States Government has and you say there are no squatters on that which you own and you have 124 acres? A. We have about 100 acres of upland and 24 acres of land under water within the harbor.

- 590 Q. That is substantially what there is of the island, isn't it, that plant that you own; the government hasn't very much? A. No; it has a strip about 75 feet wide, running from the International bridge to the south end of the island. It also has a strip on the north side about 1000 feet long I think.

Q. On the Black Rock harbor side? A. Yes.

- 591 Q. There certainly aren't very many dwellings on that strip, if there are any? A. A few.

Q. By a few you don't mean more than a dozen or two, do you, Mr. Kellogg? A. No, I shouldn't say so.

Q. So that in substance all the people on that island in any form for the last seven years have been tenants of the owner? A. Well, all the people that have structures there, yes.

- 592 Q. All that have business there as far as you know? A. Well, I think that a good many people have gone to the island to fish, to swim, to play ball and all that, that we don't pay any attention to, but I am talking about the people who have actually definite possession of ground covered by some kind of structure.

R. A. Kellogg, for Pltf., Cross.

Q. I suppose you will agree with Mr. Lytle 593
that as far as your observation has gone since
the government made the improvement and built
this wall between the harbor and the river that
that has interfered with this flow of people to
the island for baseball and such purposes? A.
It has; it has also interfered with a number of
our tenants.

Q. Kept them down? A. Very much.

594

Q. How much? A. Oh, I can only tell you
in the amount of rental obtained. I think we
had obtained as high as \$1400 a year in rentals,
and I think this last year it dropped down to six
or seven hundred dollars; it cut it in two; in the
middle.

Q. Those people that go to the island go there
in the open season, spring, summer and fall, be-
fore cold weather has put its disapproval on festi-
vities of that sort? A. All but a few of them
who live there the year around.

595

Q. There are not more than a half dozen live
there the year around, are there, Mr. Kellogg?
A. No.

Q. They get back and forth some way, as they
always have, either on the ice or by boats or in
some way? A. There is this exception, that 596
the men that own boats do go over there all win-
ter to fix up their boats, and all through the win-
ter season there are more or less people over there
doing that kind of work on these boats; that is
all.

Q. But in the winter season, except something
of that sort, there isn't much passage to and from

R. A. Kellogg, for Pltf., Cross.

597 the island except by the people who actually live there, is there? A. Not now.

Q. And that is usually over the ice in the winter, and of course they can go over the ice there as freely as they could with a rowboat? A. The period of time in which Black Rock harbor is frozen over sufficient to carry foot passengers is very short.

598 Q. It is very short, from about Christmas time to about the 1st of April or the latter part of March? A. No, I don't think Black Rock harbor often freezes over solid enough for that purpose before the middle or the end of January; it is only a couple of months.

599 Q. You wouldn't claim that this bridge should be built for the accommodation of these tenants or the owner, would you? A. Well, that is a question..

Q. You couldn't figure it in any way? A. I shouldn't ask it, Mr. Moot.

Q. You wouldn't claim it? A. I wouldn't ask it, no; whether it should be done or not I am not willing to say.

600 Q. Your claim is that it should be built under this statute for this commercial development that you have pictured as possible or probable if one is built? A. No, I claim it should be built for a perfectly definite business that is now going on.

Q. I put my question in the negative form rather than the affirmative; I don't ask you what you do claim, I ask you if you would claim a certain thing? A. I claim a certain thing, and in addition the other thing.

R. A. Kellogg, for Pltf., Cross.

Q. No, I am asking you now specifically 601 whether you would claim it should be built for this commercial development which you have pictured as impossible or quite probable? A. If you include that, Mr. Moot, the existing sand and gravel business, which isn't merely possible but is ready, I agree with you.

Q. Now that sand and gravel business has been conducted by the same people who have incorporated this company for a great many years in some form, more or less, has it not? A. No, sir.

Q. Haven't Mr. Hyman and his associates been interested in this gravel company? A. Not the slightest.

Q. They haven't any interest in that? A. None, whatever.

Q. Haven't any of the parties in this gravel company had any interest in the gravel business before; haven't they been conducting the gravel business before? A. Never to my knowledge; I will give you the names and you can see for yourself.

Q. I don't care about that; you say not and I will take your word for it! A. Not that I know of.

Q. You know that the sand and gravel business has been conducted on this river by sand suckers, as they call them, for a great many years? A. Yes.

Q. Various people have been competing for a share in that business? A. Yes.

Q. It has been conducted by vessels going out and sucking the sand up and bringing it into

602

603

604

R. A. Kellogg, for Pltf., Cross.

605 wharfs, discharging it and from which point it has been carried by trucks to various parts of the city or loaded on cars and drawn away as far as reasonable to carry it? A. Yes.

Q. Now, this company that you represent, that is conducting this business, they have rented a yard in Tonawanda from which they discharge loads from the vessels to be shipped by rail to various convenient points that are required? A. We have just rented such a yard; we haven't rented it but it has been rented by a corporation in which we own a half interest.

Q. So that its business is being conducted by some arrangement or other with your company that owns the sand and gravel? A. Yes; we also have a yard at Ferry street of our own, on the New York Central tracks.

607 Q. If this other development that you urge through the addition of an arm of the bridge could be made then the company would get whatever revenue it is entitled to under the statute for the loads that would pass over this arm of the bridge in the conduct of its business? A. Whatever it is entitled to by law; I don't know whether it is limited by the present statute or not.

608 Q. Have you made or had made any estimate of the cost of this arm of the bridge, and have you made or had made any estimate of the return from that addition to the bridge on any probable traffic there would be over that addition to the bridge? A. Why, I have made such an estimate. I can make it now. I have made this, Mr. Moot. I had two contracting engineers

P. A. Kellogg, for Pltf., Re-direct.

make an estimate some time in May, 1915, I think 609
it was, of the cost price which they would take
the contract for to build such a roadway as was
required to do the service on Squaw island.

Q. That is, you had two engineers in May,
1915, make an estimate of what they would make
this addition, this required addition to this bridge
for? A. Yes. I also have made myself nu-
merous estimates of what the traffic which we 610
propose for this bridge would be.

Q. Have you any of those detailed estimates
here, Mr. Kellogg? A. I can give them to you
in a moment. It is perfectly simple.

Q. I don't choose to spend any time on it, but
if you had them where I could expose them to the
light first I would determine whether I would
put them on the record or not. A. What I re-
fer to, Mr. Moot, is this: Take the sand and 611
gravel business by itself—

Q. (Int'g). I don't choose to ask that ques-
tion, Mr. Kellogg. If you have the specific es-
timates in black and white so that I can look at
them I would like them! A. I haven't them in
black and white, but I have them in my mind.

Q. Well, that is just where I will leave them.
A. All right. 612

RE-DIRECT EXAMINATION by Mr. Ivins:

Q. I would like to get these detail statement
on the record.

Mr. Moot: I respectfully submit that I
don't think Mr. Kellogg claims to be an
expert on the subject, and furthermore we

R. A. Kellogg, for Pltf., Re-direct.

613 have got to have something more definite than that on which to attack or defend the statute.

A. It is a mere matter of calculation from the facts already in evidence.

614 Q. Mr. Kellogg, will you state the estimates that you made of the traffic which will be available across the proposed extension of the Black Rock harbor draw or the proposed arm, based on the actual business ready to proceed in the sand and gravel business?

615 Mr. Moot: To save my point, I object on the ground that it appears that when this law was passed, or took effect, and this action was brought on January 13, 1916, by the service of a summons and complaint, there was no organized sand and gravel business whatever, and the subsequent organization of this sand and gravel company and the development of this sand and gravel business not then being in existence, it being purely problematical, we cannot be fined and made to pay penalties because we could not foresee what these gentlemen might do in the future in developing a business that didn't exist when the statute took effect.

616 The Court: I understood this witness to say that none of these men were interested in whatever business there was there at that time.

The Witness: This company bought the island on February 1st, 1915, having had

R. A. Kellogg, for Pltf., Re-direct.

an option on it for four or five years before
that. It immediately started to acquire
the necessary plant and facilities; it did
not actually dig any gravel or sell any until
the month of June, 1916. 617

Q. (The Court). That is this month? A.
1915, I beg your pardon. This all happened in
1915, last year. The title was taken in 1915, a
year ago.

618

By Mr. Moot:

Q. Then you are now correcting as to date
the statement that you made before, is that it?
A. I simply say that we bought the island Fe-
bruary 1st, 1915, and we actually began to exca-
vate the sand, grit and gravel the first week in
June, 1915. That is simply to get those dates cor-
rect, that is all. 619

Q. I understood you to give those dates be-
fore, Mr. Kellogg, as 1916? A. That was an
error, Mr. Moot. The deed here shows that it
was in 1915.

Q. While the incorporation of your sand and
gravel company was in February, 1916? A.
Yes. The developing corporation I testified took
out 66,000 yards before this sand and gravel cor- 620
poration was organized at all.

Q. Perhaps you said that but I didn't get it
if you did. A. I did.

(Last question asked by Mr. Ivins was
repeated as follows):

"Q. Mr. Kellogg, will you state the estimates
that you made of the traffic which will be avail-

R. A. Kellogg, for Pltf., Re-direct.

621 able across the proposed extension of the Black Rock harbor draw or the proposed arm based on the actual business ready to proceed in the sand and gravel business?"

By the Court:

Q. Why don't you confine yourself to what was available in traffic from sand, gravel and grit transportation on a highway arm of that bridge if in existence on the 1st day of January, 1916? A. If all available you mean, the business in actual existence? There was at that time a business of 66,000 yards per annum.

Q. That is about 100,000 tons, as I understood you to say? A. Yes.

Q. That was available on the 1st day of January, 1916? A. Yes; the business was going along at that rate at that time.

Q. And that is the amount which if the arm had been in existence would have been transported over that arm? A. I think it would have been much more than that.

Q. It would have been that amount at least? A. Yes, because we had handled that amount otherwise.

624

By Mr. Ivins:

Q. Can you tell me the market price on the 1st of January, 1916, for sand and gravel in the City of Buffalo? A. The schedule price, that is the price which everybody names, is 80 cents a yard for sand and 85 cents for grit and gravel F. O. B. car or truck. Now in the competition of the

R. A. Kellogg, for Pltf., Re-direct.

business that amount, on large orders, is very often reduced. I have known it to be as low in the last two years as a net of 67 cents on track or truck. 625

Q. Now, will you tell me what is the cost of digging and washing, if necessary, and the placing on trucks on Squaw island?

The Court: What difference does it make how much it cost this company to wash this gravel? 626

Mr. Ivins: If there is a larger margin of profit in this, your Honor, the business is likely to grow. I will withdraw the question.

Q. Can you state roughly the average annual sales of gravel and sand in Buffalo; what is the demand? A. Not from my own personal knowledge exactly. 627

Q. Are you familiar with the present operation of the International bridge; do you know whether at present watchmen are employed by the company at the ends of the bridge to keep trespassers off? A. Yes, I know that from personal experience with them.

Q. The company maintains watchmen at the Black Rock end, the Buffalo end of the International bridge? A. At both the Buffalo and the Squaw island end; at least there are men there who prevent people from going on that bridge. 628

Mr. Kellogg: I should like to say that because of the fact that the Squaw Island Freight Terminal Company, Inc., has not actually done any business within the two

A. J. Dillenbeck, for Pltf., Direct.

629 years since it was organized, we have recently organized a new company in that same name to take over that business, and the option which that company always has had to take over this island property, and I have here a deed from the Squaw Island Development Corporation to the Squaw Island Freight Terminal Company, Inc., of that island subject to the lease to the sand and gravel company.

630 Q. (Mr. Moot). What is the date of that?

A. It is dated yesterday.

Q. (Mr. Moot). Dated June 20? A. June 20, 1916.

Mr. Moot: I think I will have to object to that.

Objection sustained.

631 Mr. Kellogg: Exception.

ARVIN J. DILLENBECK, sworn for plaintiff, testified:

Examined by Mr. Kellogg:

632 Q. Mr. Dillenbeck, you reside in Buffalo? A. I do.

Q. You are mechanical and civil engineer?

A. A civil engineer.

Q. And have been for some years? A. Yes, sir.

Q. What was your training, briefly? A. I

A. J. Dillenbeck, for Pltf., Direct.

have had about 12 years' practical experience and 633 a technical training at Cornell University.

Q. (The Court) what has been your experience; can't you go on and tell us; have you built railroads or mills; what have you done; go on and tell us? A. For four years I was on railroad construction mostly in New York State at various points, covering location and construction of railroad work. For two years I was with 634 the Cambria Steel Company of Pennsylvania, as assistant engineer in the mining department. This department had charge of ore deposits, coke ovens, mines, limestone quarries and had charge of all matters pertaining thereto, bridges, water-works, the building of ovens and buildings. Since 1913 I have been with Lupfer & Rennick of Buffalo. They are consulting and contracting engineers; the majority of their work since I have been with them has been either power house or bridge construction. 635

Q. In the spring of 1915 did you personally make an examination of the draw across Black Rock harbor with reference to hanging thereon a roadway and building approaches to that roadway on the New York side and on the Squaw island side? A. Yes. 636

Q. And did you make an estimate of the cost of such work as would provide such a roadway usable by wagons and persons and motor trucks? A. Yes, I did.

Q. What in your opinion would have been the cost of doing that work in May, 1915, at the time you made the estimate?

A. J. Dillenbeck, for Pltf., Direct.

637 Mr. Moot: I object to that. The question should be December, 1915, because that was the time, from the time this law took effect, which was May 22, 1915, to the end of December, that we had to comply with the law, and it appears there was a great change in the price during that period of time in the cost of such work.

638 The Court: We will take this statement and then modify it by the increased cost of steel and other materials, if there was any increase. The witness on the other side said there was some increase in the fall of that year, 1915.

Mr. Kellogg: Mr. Dillenbeck will testify to that same effect, very largely.

Q. (The Court) The question is, how much, according to your estimate, would it then cost?
639 A. About \$10,400.

Q. The cost of steel since that time has increased, has it not? A. Since that time?

Q. Yes. A. Yes.

Q. When did the increase begin to occur? A. The increase first was in July.

640 By the Court:

Q. What we want is the percentage of increase, the difference between that time and December 31st; now can you tell us? A. December 31, 1915?

Q. Yes, what percentage of increase on the whole structure would you have to take into consideration?

Mr. Kellogg: You may as well put it, if

A. J. Dillenbeck, for Pltf., Cross.

7

you will, on the whole structure, not merely - 641
the steel but the whole thing; how much
more would it cost to build this thing in
December, 1915?

- A. Not more than 25 per cent.
Q. (The Court) Add 25 per cent to \$10,400, is
that right? A. That is right.

CROSS EXAMINATION by Mr. Moot: 642

- Q. Have you got the details of your estimate?
A. I have.

Q. Give them to the stenographer. A. Steel, \$6276; wood block and creosote plank pavement, \$2755; creosote sidewalk, \$313; extra heavy railing, \$870; grading for approaches \$200. That is all.

- Q. (The Court) total? A. \$10,414. 643
Q. How many tons of steel? A. Approximately 105.

Q. At what price? A. Three cents.
Q. Or \$60 a ton? A. That is right.
Q. That amount of steel allowed for a roadway how wide? A. A 12 foot roadway and a four foot sidewalk.

- Q. Would a 12 foot roadway be sufficient to permit two loaded trucks to pass each other? A. 644 I think it would be doubtful on that type of construction.

Q. Why, you know it wouldn't be sufficient to permit a couple of loaded automobile trucks to pass each other with their loads, don't you, 12 feet? A. It would permit trucks with a certain manner of load to pass, empty trucks might pass, but with certain loads it would not.

A. J. Dillenbeck, for Pltf., Cross.

645 Q. A five or six or seven ton automobile truck, two empty ones couldn't pass each other, could they, on that bridge with the ordinary boxes that they put on overlapping their wheels? A. I think they could.

Q. Aren't they more than six feet wide? A. The bases are not.

646 Q. I am asking you if the ordinary overlapping box of a five or six or seven ton automobile truck is not more than six feet wide? A. I believe it is.

Q. Then they couldn't pass, that type of truck couldn't pass on the bridge, could they? A. Yes, they could..

Q. In spite of the fact that their bodies are more than six feet wide? A. Yes, sir.

647 Q. How could they pass? A. The wheel bases are not five or six feet wide.

Q. How can you get one truck going one way and the other going the other way pass each other on the bridge when their boxes or platforms are more than six feet wide on each of them? A. One side of one truck could extend over on the sidewalk.

648 Q. Well, the ordinary width of a state highway is 16 feet, isn't it? A. I believe it is.

Q. Is there any reason why this bridge shouldn't be 16 feet wide? A. You refer to the roadway?

Q. I do. A. None that I know of.

Q. And really to make a reasonable allowance for accidents and blunders of drivers and all that it ought to be 16 feet wide, hadn't it? A. Yes, sir.

A. J. Dillenbeck, for Pltf., Cross.

Q. Now, what load did you provide for on this bridge? A. 18 ton trucks. 649

Q. An 18 ton truck with how many or how few wheels distributing the load? A. Four wheels.

Q. How far apart? A. 10 feet.

Q. You take a steam roller, how much space is a steam roller's 18 tons distributed over? A. I am not prepared to give any definite answer to that. 650

Q. It isn't 10 feet long, is it? A. I don't know.

Q. You don't think it is, do you? A. I don't know.

Q. If it was less than 10 feet long then you would have to increase the strength of your bridge, wouldn't you? A. Not with one roller.

Q. How about if there should be a roller going one way and a loaded truck with 10 or 12 tons on it coming the other, then what? A. I think it wouldn't be necessary. 651

Q. What wouldn't be necessary? A. To strengthen the bridge.

Q. You think allowing for 18 tons would be enough although there was 18 tons going one way 12 tons coming the other way on the same spot at the same time, passing each other? A. In designing for an 18 ton truck— 652

Q. (Int'g) Just answer that (question repeated). A. In speaking of an 18 ton roller I do.

Q. You do? A. I do.

Q. Do you mean that having allowed for an 18 ton bridge that you could put 12 tons more in

A. J. Dillenbeck, for Pltf., Cross.

653 motion going the other way on the same spot at the same time without doing anything to your bridge? A. I do.

Q. What is your factor of safety that you have allowed for? A. The factor of safety is four.

Q. What is good engineering practice as to the factor of safety in a bridge? A. Four.

Q. At least six, is it not, sir? A. Four.

654 Q. Can you give me any authority, any standard authority that drops as low as four? A. Greiner.

Q. When did Greiner come out? A. That I can't tell you. He has a standard—

655 Q. (Int'g) Don't you know that the factor of safety is at least six and has been for a great many years in bridges, in good engineering practice to put it at seven and eight, don't you know that? A. No, sir.

Q. You won't swear it isn't so, will you? A. You are asking me to swear that good engineering practice puts the factor of safety at six or seven?

Q. At least six, yes, sir. Can't you answer that? If you can't we will go on. A. Well, I wouldn't care to swear there wasn't, no.

656 Q. Don't you know as far back as 1882 the Court of Appeals of this state condemned the Lake Shore Railroad for having a factor of safety of less than six in the Ashtabula bridge built long before that, because the bridge went down, in an action where the brakeman brought the action and the company was held responsible? A. No, I have no such knowledge.

A. J. Dillenbeck, for Pltf., Cross.

Q. Don't you know that all courts from that time have held that bridges must have, as a matter of law, a factor of safety of at least six to pass the muster of the law and get the case where it wouldn't present a question of fact for a jury as to negligence in not furnishing a sufficient factor of safety? A. No. 657

Q. You never heard of that before? A. No.

Q. You didn't know there was an Ashtabula bridge case in the Court of Appeals in 1882 until I put it to you? A. No. 658

Q. Then you are not posted on this question, are you? A. I am not posted on the question of the law, no.

Q. You are not posted on the question of the factor of safety that the law passes, are you? A. I am; I know what is good practice.

Q. Who is your authority, anybody except Greiner? A. Good practice. 659

Q. I say is your authority anybody except Greiner? A. Yes, I can give you another authority?

Q. Who? A. Prof. Jacobi of Cornell University.

Q. You say he teaches a factor of safety of four? A. I do not say that he teaches a factor of safety of four. 660

Q. Or five? A. Or five.

Q. Or six? A. Or six.

Q. Do either Greiner or Jacobi teach any factor of safety below six? A. They do not teach the factor of safety.

Q. Then you don't claim that the factor of

A. J. Dillenbeck, for Pltf., Cross.

661 safety that you have used is based on their teaching? A. We do not—

Q. (Int'g) I say you do not claim that your factor of safety of four is based on the teaching of either Greiner or Jacobi? A. I do.

Q. You do? A. I do.

Q. You figure that your bridge will uphold a load of four times 18, or 72 tons, is that it? A. Yes, sir, and more too.

662 Q. Now, if you have 12 tons going one way and 18 tons going the other that makes how many tons? A. 30 tons.

Q. Does it add anything to the strain if one is moving one way and the other the other way at the same time at the moment when they pass? A. I have allowed for an impact of 30 per cent.

663 Q. That is because one was passing one way and the other the other, that would add 30 per cent? A. Not due to their passing but to the moving load.

Q. Is that it? A. It is due to the moving load; I have added 30 per cent.

Q. Now, 30 per cent added to 30 tons gives you how many tons? A. 39.

Q. 39 tons? A. Yes.

664 Q. And four times 39 tons is how many tons? A. 156.

Q. Then your factor of safety when you have these things passing isn't a factor of safety of four at all, is it? A. You have assumed that I have designed for 18 tons only. I told you that I did design for an 18 ton truck load.

Q. Isn't it true that you told me that your

A. J. Dillenbeck, for Pltf., Cross.

maximum load was 72 tons for which you designed this bridge? A. No. 665

Q. That is, it was 18 multiplied by four? A. No; if I remember correctly you asked me if it would hold up 72 tons.

Q. What did you figure on having this bridge actually hold up before it would break? A. I did not figure on a breaking load. I figured—

Q. (Int'g) How did you get your factor of safety if you didn't figure on a breaking load? A. In ordinary engineering work we assume a certain stress per square inch, which is known as a safe stress to work under. 666

Q. How did you get your factor of safety at four? A. I didn't get any factor of safety at four.

Q. You said you had the factor of safety at four? A. I did say I had the factor of safety at four, but I didn't say I didn't have more than that. 667

Q. Did you have more than that? A. That I don't know. There is no one who can tell what steel will break at. We do know that a certain stress is safe. It may break at four times that. It may break at six times that. It may break at eight times that, but no one can say definitely that steel will break at a certain point. We do know a certain stress is a safe stress to use, and that is what all engineers do in practice. 668

Q. What stress did you take? A. 16,000 pounds per square inch.

Q. That is the stress for a load of how much? A. If you apply a load—

A. J. Dillenbeck, for Pltf., Cross.

669 Q. (Int'g) That is the stress for a load of how much? A. I can't answer that question.

Q. Why did you tell me that you had figured on a bridge for a load of 18 tons on four wheels distributed 10 feet, as to front and back wheels?

A. You misinterpreted my testimony. I said I was figuring on an 18 ton truck arrangement. Now that may mean one truck or it may mean two.

670 Q. Why did you say you figured on a factor of safety of four? A. I said a factor of safety of four because I had at least that much; I may have had more.

Q. Give me your mathematical formula; give it right to the stenographer and we can work this out and that will cut it short. You have it in your book, haven't you? A. I have Greiner's specifications, if you want those; that is what I have here.

Q. You have used Greiner's specifications? A. Yes.

Q. Give me your rational of this operation by which you reached your result? A. Do you realize there are a number of different formulas?

672 Q. I realize there are formulas as numerous as there are witnesses. A. Do you want all those formulas?

Q. No, sir, I want yours. A. There is no one formula that applies to this.

Q. I want you to give the stenographer your formula which you say is right. A. The best I can do is to give you Greiner's specifications which cover all the steps.

A. J. Dillenbeck, for Pltf., Re-direct.

Q. Turn me to Greiner. If you don't know anything about it let me have Greiner. If you don't know anything about it let me have Greiner.

A. What feature would you like to know?

Q. I want the formula by which you made your calculation.

(Witness presents same).

Q. You hand me "No. 1, steel stationary bridges, by J. E. Greiner, consulting engineer, for 1911," and you turn me to page 7, a diagram showing "Concentrated live loads. All concentrations are axle loads in pounds." Does that page 7 contain the process by which you reach your conclusion that you have given us this morning? A. Yes, sir.

Q. Can you let me have them and have them marked in evidence as an exhibit? A. No; that does not belong to me.

Q. Who does it belong to? A. The firm whom I represent.

Mr. Moot: I offer that in evidence.

Received and marked "Defendant's Exhibit 48."

RE-DIRECT EXAMINATION by Mr. Ivins:

Q. As you have designed this bridge it was intended for a single track bridge and not a double track bridge, wasn't it; I mean it wasn't in your plans that vehicles should pass on the bridge? A. No.

Q. Have you ever studied law? A. No.

Q. How old are you? A. 24.

Q. You weren't alive in 1882 then? A. No.

C. Taylor, for Pltf., Direct.

677 CHARLES TAYLOR, sworn for plaintiff, testified:

Examined by Mr. Ivins:

Q. Mr. Taylor, what is your business? A. Ice cream manufacturer.

Q. Where do you live? A. At 237 Hampshire street, Buffalo, N. Y.

678 Q. Are you a member of the West Side Business Men's Association? A. Yes.

Q. Do you hold any office in that association? A. I am vice president and chairman of the execution committee.

Q. How long have you lived in Buffalo? A. Practically all my life; about 35 years.

679 Q. Do you live near Niagara street? A. About five blocks from Niagara street and about seven blocks from the Ferry street entrance to Squaw island.

Q. Niagara street is the street parallel to Black Rock harbor? A. Yes, that is, the thoroughfare.

680 Q. That is the street that the trolley cars run down that have been spoken of several times? A. Yes.

Q. It is a pretty populous neighborhood? A. Yes, it is quite well built up.

(Mr. Ivins stated substantially, in reply to a question by the court, that he proposed to show by this witness that he had seen thousands of people on Squaw island; that at one time there was a picnic on the island

C. Taylor, for Pltf., Direct.

and he had seen several thousand people 681 there on that occasion and that he had counted them).

By the Court:

Q. When was the picnic? A. Last summer there was one and the summer before I was to one picnic.

Q. 1915? A. 1915 and 1914.

Q. How many people did you count there at 682 that time? A. I didn't count the people; we counted the tickets that were sold.

Q. Each person had a ticket? A. Yes.

Q. How many were there? A. Why, about 4000 people.

Q. How did they get over there? A. Some came over in the little scow that ran back and forth, that is, sort of a ferry, and some walked down through the cow path from Ferry street. 683

Q. Some went over the Ferry street way and some went in boats? A. Yes; I should estimate it is about nearly two miles from Ferry street to the point where they held some of the games, the baseball games. The West Side Rowing Club have races in the harbor, and while I didn't attempt to count the people who were there it looked to me as though there were 20 or 25 thousand people, from my experience of the number of tickets we sold. 684

Q. 20 or 25 thousand people on the island? A. Not on the island, along both sides of the river.

H. R. Safford, re-called for Deft., Cross.

685 By Mr. Ivins:

Q. Are you familiar with land values along Niagara street? A. No, I couldn't say that I am because I have never bought any property there.

(No cross examination).

686

H. ROBINSON SAFFORD, re-called for further Cross Examination:

Examined by Mr. Ivins:

Q. Mr. Safford, the bridge across the Niagara river proper is a single track bridge? A. Yes.

687

Q. As an engineer what is the car capacity of the whole bridge, that is from shore to shore, how many cars could be brought across allowing an equal number going in each direction, how many cars would cross the bridge from the Canadian side to Black Rock in a day, the maximum?

688

The Court: That draw bridge is 1200 feet long and the little bridge is 431 feet long.

Mr. Ivins: What I want to know is the capacity of the bridge for handling traffic.

Mr. Moot: That I object to as incompetent and improper.

Mr. Ivins: I will withdraw the question.

H. R. Safford, re-called for Deft., Re-direct.

RE-DIRECT EXAMINATION by Mr. Moot: 689

Q. In what was said in the negotiations between you and Mr. Kellogg before the passage of this law, at the time that he mentioned in your hearing, or after the passage of the law, as to your estimate of the maintenance and expense of this bridge, you covered what items in your estimate? A. That question isn't very general. It applied only to the cost of the roadway on the bridge. It was a very tentative discussion, an estimate of the probable cost of employing toll keepers; practically no cost covering the approaches to the bridge, which were in this discussion to be built by the Development Company, and the expense of toll keepers on the bridge was as before stated, along the most general lines, and with the expectation that the business at that time might not require, at the beginning at least, but the services of two men day and night; the negotiations didn't get to a point where the exact cost could be very definitely fixed.

Q. You didn't undertake, in other words, to cover interest on the investment or depreciation on the bridge or any items of that general character? A. We did cover interest on the investment in the roadway arm and the depreciation on that arm, but not on the approach. 691

Q. The figures you gave us yesterday covered the other items? A. Yes.

Q. And were more accurate? A. Yes.

Q. The difference in cost of that estimate, as you gave it, and as the witness gave it this morn-

H. R. Safford, re-called for Deft., Re-direct.

693 ing, depended upon whether you allowed for a bridge sufficient to carry passing loaded vehicles with ^{the} state maximum of 18 tons for a steam roller and having it wide enough so they could pass, in other words, 16 feet wide? A. Well, without having seen his exact calculation, it appeared that the difference must be due to the fact that he didn't figure on quite as heavy a maximum load as I did, and that the bridge was to be not quite so wide.

694 Q. You figured on a maximum load of 18 tons, as the state does for its highway bridges? A. No; we figured on a maximum load of a trolley car.

Q. Which is how many tons? A. 100,000 pounds or 50 tons.

695 Q. Two steam rollers of two loads of 18 tons passing each other would be 36 tons? A. Yes, calculating the bridge at the specification today for the New York State Highway Commission—I will express that a little differently. Taking the present specification of the New York Highway Commission for the loading of highway bridges, which provides for a steam roller of 18 tons, we found from some calculations recently made that the amount of steel which would be required on this arm to conform to that specification was very little less than that required for the specification we had used some years ago, namely a 50 ton car.

Q. For a trolley car? A. A 50 ton trolley car.

Q. So you figured on a 50 ton trolley car

H. R. Safford, re-called for Dft., Re-direct.

as you mentioned as the proper factor of safety according to engineering practice? A. Yes. 697

Q. That was the basis of your figures yesterday? A. That was the basis of the plan.

Mr. Baker: I offer this photograph in evidence which is dated June 17, 1916, and shows the southeast abutment of the Black Rock harbor bridge, also the abutment of the southwest side of the bridge, which is designed for the placing of the proposed roadway and footpath. 698

The Court: It shows an abutment, it doesn't show what it was designed for.

Received and marked "Plff's Ex. I."

Mr. Baker: I offer this photograph in evidence, bearing date June 17, 1916, showing the same as the other photograph, and a portion of the south end of Squaw Island. 699

Received and marked "Plff's Ex. J."

Mr. Baker: I offer in evidence photograph dated June 17, 1916, showing a portion of the east end of the island, a portion of Black Rock Harbor and the property to the east thereof.

Received and marked "Plff's Ex. K." 700

Mr. Baker: I offer in evidence a photograph bearing date June 17, 1916, showing a portion of the bridge across Niagara river and a portion of the bridge across Black Rock Harbor and the embankment on Squaw Island between.

Received and marked "Plff's Ex. L."

Offering of Exhibits.

- 701 Mr. Moot: It is stipulated that a photograph may be produced by Mr. Baker, which he says is correct, showing the approach on the bridge from the Niagara street side, and I stipulate that he may put it in when he finds it.
- 702 Mr. Ivins: I offer in evidence a statement handed to me by Mr. Moot, which appears to give a quotation from Poor's Manual of 1910, covering the International Bridge Company for the year ended June 30, 1909, showing the balance sheet as stated in Poor's Manual, and also a statement of what the correct figures should be.
Received and marked "Plff's Ex. M."
- 703 Mr. Ivins: I offer in evidence a similar statement with regard to Poor's Manual for 1911.
Received and marked "Plff's Ex. N."
- Mr. Moot: These of course I take it, your Honor, are subject to my objection as to their competency. I understand your Honor will let them in subject to my exception?
- The Court: Yes.
- 704 Mr. Ivins: I offer a similar statement from Poor's Manual of 1912.
Received and marked "Plff's Ex. O."
- Mr. Ivins: Also a similar statement from Poor's Manual for 1913.
Received and marked "Plff's Ex. P."
- Mr. Ivins: Also a similar statement from Poor's Manual of 1914.

Offering of Exhibits.

- Received and marked "Plff's Ex. Q." 705
Mr. Ivins: I offer in evidence Poor's Manual for 1915, where at pages 1827 and 1828 the statistics of the International Bridge Company are given, which are conceded by Mr. Moot to be correct summaries.
- Received and marked "Plff's Ex. R and R-1."
Mr. Ivins: I offer in evidence three letters from the War Department. 706
- Mr. Moot:** I object to their competency, and not bearing on any issue in the case.
- Objection overruled. Defendant excepted.
- Received and marked "Plff's Exs. S, T and U."
Mr. Ivins: I offer in evidence Chapter 135 of the laws of 1858. 707
- A copy of same was received and marked "Plff's Ex. V."
- Mr. Ivins:** Also offer Chapter 54 of the laws of 1862.
- Received and marked "Plff's Ex. W."
Mr. Ivins: Also Chapter ~~225~~ 390 of the laws of 1867.
- Received and marked "Plff's Ex. X." 708
Mr. Ivins: Also Chapter 390 of the laws of 1871.
- Received and marked "Plff's Ex. Y."
Now I offer in evidence a certified copy of the annual report made by the International Bridge Company to the State Tax Department of the State of New York, and verified November 12, 1913.

Defendant's Exhibit 9.

709 Mr. Moot: I take it that will be received under your Honor's ruling and will be subject to my objection and exception?

The Court: Yes.

Received and marked "Plff's Ex. Z."

Mr. Ivins: I offer a similar certified copy of a similar tax report, verified November 5, 1914.

710 Received and marked "Plff's Ex. AA."

Mr. Ivins: I offer a certified copy of a similar statement, verified November 15, 1915.

Received and marked "Plff's Ex. BB."

Mr. Ivins: That is all the plaintiff's rebuttal.

Mr. Moot: I offer in evidence this Squaw island map.

711 Received and marked "Deft's Ex. 49."
Testimony closed.

DEFENDANT'S EXHIBIT 9.

THE ATTORNEY GENERAL v. THE INTERNATIONAL BRIDGE COMPANY,
6 Ontario Appeals Reports, 537.

712

Injunction—Bridge company—Specific performance of Acts of Parliament—Attorney General of Ontario—Locus standi.

The defendants were a company incorporated by the Dominion Parliament for the construction of a bridge from Canada to the United States,

Defendant's Exhibit 9.

across the Niagara river, which was to be as well for the passage of persons on foot and in carriages, and otherwise, as for the passage of railway trains. The company completed the bridge for railway purposes only. The time limited by the charter for the completion of the work having elapsed, an information was filed seeking to restrain the use of the bridge by a railway company to which the bridge had been leased, until put in condition for ordinary traffic, or for the removal of the bridge as a nuisance, and to compel permission of its use by foot passengers on payment of the statutory tolls.

bridge, owing it is said to engineering difficulties, could not be adopted to the use of carriages and foot passengers.

Held, reversing the judgment of SPRAGGE, C., reported in 28 Grant 65, that the abandonment of that portion of the work relating to foot passengers and carriages was not a public nuisance; and the Act of incorporation was not a contract with the public, but merely gave conditional powers creating correlative duties, and was permissive; and that specific performance thereof would not be enforced.

Held, also, that the Attorney-General for Ontario, as representing only a limited portion of the public with whom, if at all, such contracts existed, had no *locus standi*.

The work being one within the jurisdiction of the Parliament of Canada, that parliament, pre-

Defendant's Exhibit 9.

717 sumably with the knowledge of the state of the bridge, allowed debentures to be issued upon it.

Held, upon this ground also the Attorney-General of Ontario was not the proper party to file the information.

718 Held, also, that as the bridge extended beyond the limits of the Province, part only being therein, it would be unavailing for the court to give the public the right to pass over that part of the bridge only which was within its jurisdiction; and for this reason, also, the court would not interfere.

719 This was an appeal from the judgment of Spragge C., reported in 28 Gr. 65, where the facts are fully stated.

On May 19th, 1881, the appeal was argued (a). E. Blake, Q. C., and Walter Cassels for the appellants. MacLennan, Q. C., and McCarthy, Q. C., for the respondents, Blake, Q. C., in reply:

720 November 28, 1881. Burton J. A.—The information in this case is based on the assumption that the bridge, not having been constructed in conformity with the requirements of the Act of Parliament authorizing its construction, is not the structure authorized by the Legislature and a nuisance, and the principal prayer of the informer is directed to obtaining the decree of the court to abate the nuisance and remove the

Defendant's Exhibit 9.

structure from the navigable waters of the Niagara river, and I do not for a moment doubt the right of the Attorney-General of Ontario to represent the public in any such case, either in equity or by prosecution at law. There is abundance of authority for informations directed to the repression of acts which the parties had no legal right to do, and which were not only authorized to be done, but were in fact acts of public nuisance. If, for example, the company had proceeded to build one of the piers and had then abandoned the work there could be no question of the right of the Attorney-General to prefer an indictment for a nuisance, or to take such other proceedings as he might find most expedient to guard the public interest; but the decree is not based upon that prayer of the bill, and although the argument was faintly renewed before us that the bridge, not having been completed so as to serve all the purposes referred to in the Act, is a nuisance, it is perfectly manifest, for the reasons stated by the learned Chancellor, that that contention cannot prevail. The piers, which alone could constitute the impediment to the free navigation of the river, are not complained of, and the main structure, that is the bridge for the conveyance of trains has been built in a manner which is shown to be admirably adopted to this purpose; and to hold that such a structure, which has been put up at an enormous expenditure of skill and money, and upon which the Legislature had authorized a debt of several hundred thousand dollars to be charged,

721

722

723

724

Defendant's Exhibit 9.

725 could be abated as a nuisance, because the company has omitted or refused to complete some portion of the structure intended for the use of carriages and foot passengers, and not in the slightest degree affecting the navigation of the river, would be a reflection on the administration of justice. The fallacy consists in calling the abandonment of a portion of the work a public nuisance, instead of, what it probably is, an abuse of the Act of Parliament.

726
727 If the information had contained only such allegations as those upon which the decree is based, omitting all reference to the structure being a nuisance, and confining its prayer to the relief now granted, I apprehend it would have been demurrable, both on the ground that no contract with the public is shewn, and because the Attorney-General for Ontario, who can represent only a limited portion of the public with whom, if at all, such a contract exists, has no *locus standi* on such an application.

728 The work is one within the jurisdiction of the Government and Parliament of Canada. That Parliament, presumably with the knowledge that it was only completed for railway traffic, has nevertheless recognized it, and allowed a large amount of debentures to be issued, and charged upon it, and upon which therefore the holders rely for repayment; and it may be that the Attorney-General of the Dominion, acting for the Crown, is not disposed to exact this further per-

Defendant's Exhibit 9.

formance, or may be prepared to recommend the 729
passage of a bill to dispense with it. It would be
a strange anomaly if, notwithstanding this be-
ing the feeling of the Dominion authorities, a
bill could be filed by the Attorney-General of the
Province seeking in effect to compel the specific
performance of this Act of Parliament. Regard-
ed therefore in that light, I am disposed to think
the Attorney-General of Ontario is not the prop-
er party to file this information. 730

But I am of opinion that no grounds have
been shewn for the interference of the court. It
is now perfectly well established, since the de-
cision of the Exchequer Chamber in *Regina v.*
York and North Midland R. W. Co., 1 E. & B.
858, that Acts of this description are not to be
regarded, as they had come to be regarded, as
contracts: That they are what they profess to
be and nothing more; they give conditional pow-
ers which if acted upon will carry with them
duties. Statutes may be so framed as to render
it obligatory upon the companies to proceed with
the works, but that it not so in the present case;
the words of the Act are simply permissive; nor
is there, in my opinion, anything in the argument
that although originally permissive it ceased to
be so and became obligatory when once begun.
Suppose the company had constructed the foot-
way as the least expensive portion of the work,
and then finding the railway bridge too expen-
sive had abandoned it, could it be contended with
any force that the shareholders should, at a 731
732

Defendant's Exhibit 9.

733 ruinous loss to themselves, proceed with its construction? Yet that must follow, if this argument be sound.

It would have been a very different matter if the works had been fully completed. I do not for a moment doubt that in such case a company could be compelled by mandamus or decree of this court fairly and fully to carry out the objects for which they were created: *Rex v. Severn and Wye R. W. Co.*, 2 B & A1. 645.

For these reasons I think this decree cannot be supported, for I assume the fact to be, not that a foot-way for passengers had been made, but that parties can manage to pass on foot by the side of the track, and that that portion of the bridge has not been completed any more than the carriage-way in compliance with the Act of Parliament. But I think that independently of these considerations it is manifest that the jurisdiction of this court to grant relief cannot extend beyond the limits of the Province, and it being a fundamental principle of the law of mandamus, as well as of injunction, that it will never be granted in cases where if issued it would prove unavailable, there could be no object in giving the public the right to pass over the bridge as far only as Squaw island; and if for no other reason this court should not interfere.

I am of opinion, therefore, that the appeal should be allowed, and the information dismissed, with costs.

Stipulation as to Case.

Patterson and Morrison, JJ. A., and Osler, J., 737 concurred.

* Appeal allowed.

STIPULATION AS TO CASE.

STATE OF NEW YORK.

SUPREME COURT—ALBANY COUNTY.

738

PEOPLE OF THE STATE
OF NEW YORK,

Plaintiff-Respondent,

vs.

INTERNATIONAL BRIDGE
COMPANY.

Defendant-Appellant.

739

IT IS HEREBY STIPULATED AND AGREED that the said case and exceptions which contains all the evidence and proceedings taken upon the trial of this action may be settled, signed and ordered filed in the office of the Clerk of the County of Albany, New York.

740

Dated, day of , 1916.

EGBURT E. WOODBURY,

Attorney General,

Attorney for Plaintiff.

MOOT, SPRAGUE, BROWNELL & MARCY,

Attorneys for Defendant.

Stipulation, Waiver of Certification.

741

ORDER TO FILE.

SUPREME COURT—ALBANY COUNTY.

PEOPLE OF THE STATE OF NEW YORK, <i>Plaintiff-Respondent,</i>	}
vs. INTERNATIONAL BRIDGE COMPANY, <i>Defendant-Appellant.</i>	

742

The foregoing case and exceptions contains all the proceedings had on the trial of this action and the same is hereby settled and ordered filed in the office of the Clerk of the County of Albany, New York.

743

J. S. C.

STIPULATION, WAIVER OF CERTIFICATION.

SUPREME COURT—ALBANY COUNTY.

744

PEOPLE OF THE STATE OF NEW YORK, <i>Plaintiff-Respondent,</i>	}
vs. INTERNATIONAL BRIDGE COMPANY, <i>Defendant-Appellant.</i>	

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the

Stipulation and Waiver of Certification.

respective parties to the above entitled action 745
 that the foregoing copies of summons, and com-
 plaint, answer, request to find, decision, case and
 exceptions, judgment, notice of appeals to the
 Appellate Division and all papers and documents
 in said case contained are true and correct trans-
 scripts of and from the originals now on file in
 the office of the Clerk of the County of Albany,
 and that the same may stand on this appeal with
 the same force and effect as if certified by the
 clerk of said court; and 746

IT IS FURTHER STIPULATED, that any
 and all of the plaintiff's exhibits and the defendant's
 exhibits herein or any part thereof, whether
 printed in the record and made a part hereof
 or not, may be produced and used upon the argu-
 ment of this appeal and that all the exhibits may
 be produced and used upon the argument of this
 appeal with the same force and effect as if set
 forth in the printed case on appeal herein. 747

EGBURT E. WOODBURY,
Attorney for Plaintiff-Respondent.

MOOT, SPRAGUE, BROWNELL & MARCY, 748
Attorneys for Defendant-Appellant.

NOTICE OF APPEAL TO COURT OF
APPEALS.

749

SUPREME COURT—ALBANY COUNTY.

THE PEOPLE OF THE
STATE OF NEW YORK,
Plaintiff-Respondents,
against
THE INTERNATIONAL
BRIDGE COMPANY,
Defendant-Appellant.

750

Sirs:

PLEASE TAKE NOTICE that the above named defendant hereby appeals to the Court of Appeals from the judgment of affirmance entered in Albany County Clerk's office on the 2nd day of August, 1917, on an order of the Appellate Division, Supreme Court, Third Department, entered in the office of the Clerk of Albany County on the 7th day of July, 1917; affirming, with costs, the judgment of the Supreme Court entered on the 20th day of November, 1916, in the office of the Clerk of the County of Albany, in favor of the plaintiffs and against the defendant, for the sum of Seven Hundred and Forty-four Dollars and Forty-two Cents (\$744.42). And the said defendant appeals from each and every part of said judgment of affirmance and from the whole thereof.

Dated, August 3rd, 1917.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant-Appellant,
Office & P. O. Address,
302 Erie County Savings Bank Bldg.,
Buffalo, N. Y.

Order of Affirmance.

To

753

1 The Clerk of the County of Albany,
And to

Hon. Merton E. Lewis,
Attorney General.

ORDER OF AFFIRMANCE.

754

At a term of the Appellate Division of the
Supreme Court held in and for the
Third Judicial Department at Albany,
commencing May 1, 1917.

Present: Hon. John M. Kellogg,

Presiding Justice.

Hon. George F. Lyon,

755

Hon. John Woodward,

Hon. A. V. S. Cochrane,

Hon. Albert H. Sewell,

Justices.

THE PEOPLE OF THE
STATE OF NEW YORK,

Plaintiffs-Respondents.

756

vs.

THE INTERNATIONAL
BRIDGE COMPANY,

Defendant-Appellant.

An appeal having been taken to this court, by
the defendant, from a judgment of the Supreme

192

Judgment of Affirmance.

- 757 Court entered on the 20th day of November, 1916,
in the office of the Clerk of the County of Al-
bany, in favor of the plaintiffs and against the
defendant for the sum of seven hundred forty-
four and 42/100 (\$744.42) dollars, and said ap-
peal having been argued by Adelbert Moot, Esq.,
of counsel for the appellant, and by James S. Y.
Ivins, Esq., of counsel for the respondents, and
due deliberation having been had, it is hereby
758 unanimously

ORDERED AND ADJUDGED that the judgment so appealed from be in all things affirmed, and that the respondents recover of the appellant the costs of this appeal.

JOSEPH H. HOLLANDS

759

Clerk

JUDGMENT OF AFFIRMANCE.

SUPREME COURT—ALBANY COUNTY.

760

**PEOPLE OF THE STATE OF
NEW YORK.**

vs

THE INTERNATIONAL
BRIDGE COMPANY.

Defendants.

The above named defendant, The International Bridge Company, having duly appealed to the

Judgment of Affirmance.

Appellate Division of the Supreme Court from 761
 the judgment of the Supreme Court entered in
 the office of the Clerk of the County of Albany
 on the 20th day of November, 1916, in favor of the
 plaintiff and against the defendant, for the sum
 of seven hundred forty-four and 42/100 (\$744.42)
 dollars, and the said Appellate Division of the
 Supreme Court having rendered its decision af-
 firming said judgment and order, unanimously 762
 affirmed said judgment with costs to the plain-
 tiffs-respondents and a certified copy of the or-
 der of said Appellate Division having been duly
 taxed by the clerk of this court:

NOW, on motion of Merton E. Lewis, Attorney
 General, attorney for the plaintiffs, it is

ORDERED, ADJUDGED and DECREED that
 the judgment so appealed from be, and the same
 hereby is in all things affirmed, and it is further

ADJUDGED that the plaintiffs, the People of
 the State of New York, recover of the defendant,
 International Bridge Company, the sum of
 \$163.00 the costs of said appeal, and that the
 plaintiffs have execution therefor.

763

764

Judgment this 2nd day of August, 1917.

L. C. WARNER,

Clerk.

AFFIDAVIT OF NO OPINION.

765

STATE OF NEW YORK.

COURT OF APPEALS.

PEOPLE OF THE STATE OF
NEW YORK,

Plaintiff-Respondent,

vs.

766 INTERNATIONAL BRIDGE
COMPANY,

Defendant-Appellant.

State of New York,

County of Erie,

City of Buffalo.

} ss.:

767 GERALD WARD BROOKS, being duly sworn, deposes and says; that he is managing clerk in the office of Moot, Sprague, Brownell & Marey, attorneys for the defendant-appellant, above-named; that deponent is informed and verily believes that no opinion was written or handed down by the Appellate Division of the Third Department, or any of the judges thereof, in granting the order of affirmance in this case.

768

GERALD WARD BROOKS.

Subscribed and sworn to before
me this 21st day of September, 1917.

James C. Sweeney,

Notary Public in and for

Erie Co., New York.

STIPULATION AND WAIVER OF CERTIFICATION.

769

SUPREME COURT.

COURT OF APPEALS.

THE PEOPLE OF THE
STATE OF NEW YORK,
Plaintiff-Respondent,
against
INTERNATIONAL BRIDGE
COMPANY,
Defendant-Appellant.

770

IT IS HEREBY STIPULATED AND AGREED that the foregoing case and exceptions contains all the evidence and proceedings taken upon the trial of this action, and

771

IT IS FURTHER HEREBY STIPULATED AND AGREED that the foregoing copies of summons and complaint, answer, request to find, decision, case and exceptions, judgment, notice of appeal to the Appellate Division, order of affirmance of Appellate Division, judgment of affirmance and notice of appeal to the Court of Appeals, and all papers and documents in said case contained, are true and correct transcripts of and from the originals now on file in the office of the Clerk of the County of Albany, and that the same may stand on this appeal with the same force and effect as if certified by the clerk of said county, and

772

Stipulation and Waiver of Certification.

773 IT IS FURTHER STIPULATED that any and all of the plaintiff's exhibits and the defendant's exhibits herein, or any part thereof, whether printed in the record, and made a part hereof, or not, may be produced and used upon the argument of this appeal, and that all exhibits may be produced and used upon the argument of this appeal with the same force and effect as if set forth in the printed case herein.

774

MERTON E. LEWIS,
Attorney for Plaintiff-Respondent.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant-Appellant.

775

776

195
No. 2.

Supreme Court of the United States.

INTERNATIONAL BRIDGE COMPANY, Plaintiff in Error,
against

PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

It is hereby stipulated by and between the attorneys for the respective parties hereto that the annexed is a true copy of the opinion rendered herein by the Court of Appeals of the State of New York and that the same may be filed in the office of the Clerk of the County of Albany and may be annexed by said clerk to the record in this case and returned as part of said record to the Supreme Court of the United States.

Dated June 18, 1918.

MOOT, SPRAGUE, BROWNELL &
MARGY,

Attorneys for Plaintiff in Error.

MERTON E. LEWIS,

J. S. Y. I.,

Attorney General, for Defendant in Error.

[Endorsed:] Albany County N. Y. Filed Jun- 25, 1918. Clerk's Office.

196 THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

v.

INTERNATIONAL BRIDGE COMPANY, Appellant.

(Decided March 12, 1918.)

Appeal from a judgment of the Appellate Division, third department, unanimously affirming a judgment entered upon a decision after trial at Special Term. The facts, so far as material, are stated in the opinion.

Adelbert Moot for appellant.

Merton E. Lewis, Attorney-General (James S. Y. Ivins of counsel), for respondent.

McLAUGHLIN, J.:

This action was brought to recover penalties aggregating \$500, alleged to have been incurred by defendant's failure to construct, before January 1, 1916, as required by chapter 666 of the Laws of 1915, a roadway for vehicles and a pathway for pedestrians upon its bridge across Black Rock harbor from land in the state of New York

to Squaw island in the Niagara river. The Answer admitted the failure to construct such ways but denied that defendant was liable for the penalties alleged. It also set up affirmative defenses to the effect that the act of 1915 was unconstitutional and void. At the trial the plaintiff had a judgment for the amount claimed, which was unanimously affirmed by the Appellate Division, and defendant appeals to this court.

The defendant is a New York corporation. By chapter 753 of the Laws of 1857 a corporation by the same name was formed for the purpose of constructing a bridge across the Niagara river near the city of Buffalo, and a provision was inserted in the act to the effect that the bridge might be built as well for the passage of persons on foot and in carriage as for the passage of railroad trains. About the same time the Canadian government passed a somewhat similar act (20 Victoria, chap. 227) incorporating a company by the same name and for the same purposes. That act also contained provision to the effect that the bridge, when constructed, "shall be well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains." In 1869 these two corporations were consolidated by an act of the legislature of the state of New York with "all the rights, privileges and franchises, and subject to all the disabilities and duties of each of such corporations so consolidated." (Laws of 1869, chap. 550, section 6.) The charter obtained by defendant was confirmed by the Congress of the United States. (Laws of 1870, chap. 176.) Thereafter, and between 1869 and 1874, defendant constructed a bridge across the Niagara

197 river opposite the city of Buffalo, but no provision was made for vehicles or foot passengers thereon. In 1899, or sometime prior thereto, defendant submitted a plan for approval to the secretary of war of the United States for the reconstruction of the bridge. Such plan was approved and showed upon either side of the proposed reconstructed bridge a passageway for pedestrians and vehicles. The bridge was reconstructed according to the plan, except no passageway for pedestrians or vehicles was provided. Some time thereafter the United States government, with a view of obtaining suitable channel for deep water craft around the rocks and shoals at the head of the Niagara river, acquired from the state of New York (Laws of 1904, chap. 373) all its right and title to the lands and waterways necessary for the contemplated improvement, including the land under the water of Black Rock harbor and that portion of the Erie canal adjacent thereto. In 1907 the secretary of war gave notice to the defendant that its bridge over Black Rock harbor across the Erie canal was an unreasonable obstruction to navigation, and that the same must be removed and a new one constructed according to certain requirements specified. Pursuant to this notice defendant submitted a plan for the rebuilding of the bridge to the secretary of war, who approved the same. This plan showed on either side, dotted lines, a way for pedestrians and vehicles, and contained a statement that "roadways shown in dotted lines not to be put in present but provision is made in the design of the bridge for the future construction." The bridge was reconstructed in pursuance

this plan but the roadways were not then and have not since been built.

In 1915 the legislature of this state passed the act before referred to, under which the penalties stated have been recovered. The first section of the act provides that chapter 753 of the Laws of 1857, entitled "An Act to incorporate the International Bridge Company" is hereby amended by adding thereto a new section, to be known as section 15-a. This new section provides in substance that a roadway for vehicles and a pathway for pedestrians shall be constructed upon the draw across Black Rock harbor between Squaw island and the mainland of New York state and be ready for use by January 1, 1916, and if defendant or its successor in interest did not complete the same on or before that time, then it or its successor should be liable to a penalty of fifty dollars for each day it remained in default, the same to be sued for and collected by the attorney-general of the state. The act also contains a provision to the effect that after the ways have been completed, tolls might be required to be paid by the persons using them. The roadway and pathway were not built and this action followed with the result before stated.

The validity of the judgment which has been recovered is attacked principally upon three grounds, which will hereafter be considered in the order named:

(a) That the act of 1915 is unconstitutional in that it violates the provision of a contract—the charter granted in 1857—by imposing additional burdens and obligations upon the defendant.

(b) That the Federal government has taken exclusive control of the bridge, or at least to such an extent as to prevent the state of New York legislating in any way with reference thereto.

(c) That the act of 1915 is confiscatory and deprives the defendant of its property rights without due process of law.

1. The International Bridge Company, by the act of 1857, obtained from the state of New York the right to build a bridge over the river in New York to the center of the Niagara river. It may well be doubted whether, in view of the language used in the act, the bridge company were obligated, if it built a bridge, to provide a way for carriages and pedestrians. The state, of course, in granting the charter, reserved to itself the right to amend it at any time, but this reservation did not authorize the state, the charter having been accepted and acted upon to the extent that it had ripened into property rights, to deprive defendant of the benefits thus obtained without compensation. (*Monongahela Navigation Co. v. United States*, 148 U. S. 312; *People v. O'Brien*, 111 N. Y. 1.) Nor could the state impair the value of the franchise by imposing additional burdens without paying for it. (*Trustees of Southampton v. Jessup*, 162 N. Y. 122.) Does the act of 1915 deprive this defendant of any rights which it obtained by the act of 1857 or impose upon it burdens not thereby imposed? I think not. Defendant did not construct a bridge under that act. The bridge which was constructed was built after the corporations formed by the act of 1857 and the Canadian act had been consolidated into the present corporation by chapter 550 of the Laws of 1869. If it be assumed the act of 1857 did not impose an obligation upon the defendant to build ways for

pedestrians and vehicles, the Canadian act certainly did. The language of that act was: "Said bridge shall be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains." When the two corporations, therefore, were consolidated, with their consent and the consent of the state of New York, the defendant became obligated to construct a bridge for railroad trains, foot passengers and vehicles. The charter thus given by the consolidating act was accepted subject to whatever duties were imposed upon either or both of the old corporations.

The bridge, as we have seen, was built under the consolidating act, but provision was made only for railroad trains.

199 It had by the acceptance of the charter obligated itself to build one also for pedestrians and vehicles. Compelling it to keep its implied agreement to do what the charter required does not impair the obligation of the contract or impose additional burdens. In my opinion the act of 1915 is a valid legislative enactment.

2. After the consolidation took place the defendant had the right to build the bridge. The state of New York, however, had the title to, and governmental control of, the land under the waters of the river. This control, nevertheless, was subject to the supervision of the United States in so far as commerce was concerned, but this supervision did not give to the United States government, as against the state of New York, authority to construct a bridge, nor could it take the state's property in the bed of the river for that purpose any more than it could take property elsewhere without condemnation and payment. It could give its consent to the construction of a bridge upon such terms as it saw fit and even after the bridge was built, if it interfered with commerce, could withdraw its consent and compel its removal. It did consent that defendant construct piers for the bridge on property of the state and the bridge, with the consent of the state, was built on such property. No way was provided for pedestrians or vehicles. It was built primarily for interstate and foreign commerce, but this did not give the United States any other or greater supervision over it than it otherwise had. It could simply regulate its use for interstate and foreign commerce. This did not subject the defendant to the control of the United States government in any other respect. It still remained a New York corporation which state had the power to regulate within its limits matters of internal police, including in that general designation "whatever would promote the peace, comfort, convenience and prosperity of its people." This power included among other things the construction of bridges within its territory. It is only so much of the bridge which is here being considered as lies entirely within the state of New York, and while it gave the right, in the first instance, to construct the bridge, it retained the right, in the interest of the people of the state, to supervise and direct how it should be used, subject only to the Federal government's regulations so far as such use might relate to interstate and foreign commerce. The relation thus existing between the parties was not, in my opinion, changed by the fact that the state of New York ceded to the United States the land under the waters of the Niagara river, including a portion of the Erie

The plaintiffs base their right to relief is that the United States, by the acts of Congress referred to and by what has been done under those acts, has taken 'possession' of the Calumet river, and so far as the erection in that river of structures such as bridges, docks, piers and the like is concerned, no jurisdiction or authority whatever remains with the local authorities. In a sense, but only in a limited sense, the United States has taken possession of Calumet river, by improving it, by causing it to be surveyed, and by establishing lines beyond which no dock or other structure shall be erected in the river without the approval or consent of the secretary of war, to whom has been committed the determination of such questions. But Congress has not passed any act under which parties, having simply the consent of the secretary, may erect structures in Calumet river without reference to the wishes of the state of Illinois on the subject. * * * Calumet river, it must be remembered, is entirely within the limits of Illinois, and the authority of the State over it is plenary, subject only to such action as Congress may take in execution of its power under the Constitution to regulate commerce among the several States. That authority has been exercised by the State ever since it was admitted into the Union upon an equal footing with the original States. * * * The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government. The secretary of war, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies." (p. 426.)

As to the contention that the act of 1915 is confiscatory and deprives defendant of its property without due process of law, but little need be said. The trial court found as a fact, and the finding has been unanimously affirmed by the Appellate Division, that "the probable cost of constructing the roadway and foot-path required by chapter 666 of the Laws of 1915, is insignificant in comparison to the assets and annual net earnings of the defendant." It also 202 found, and this finding was also unanimously affirmed, that "there is no evidence in the record showing that the investment required by chapter 666 of the Laws of 1915 would not yield a reasonable return to the defendant." These findings, as it seems to me, are fatal to the appellant's claim. If the investment necessary for the construction of roadways would not enable defendant to earn a fair return upon its investment then it was incumbent upon it to establish that fact. (Willcox v. Consolidated Gas Co., 212 U. S. 19; Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262.) The court cannot assume, in the absence of such proof, that the act is confiscatory or that it in any way interferes with rights possessed by defendant.

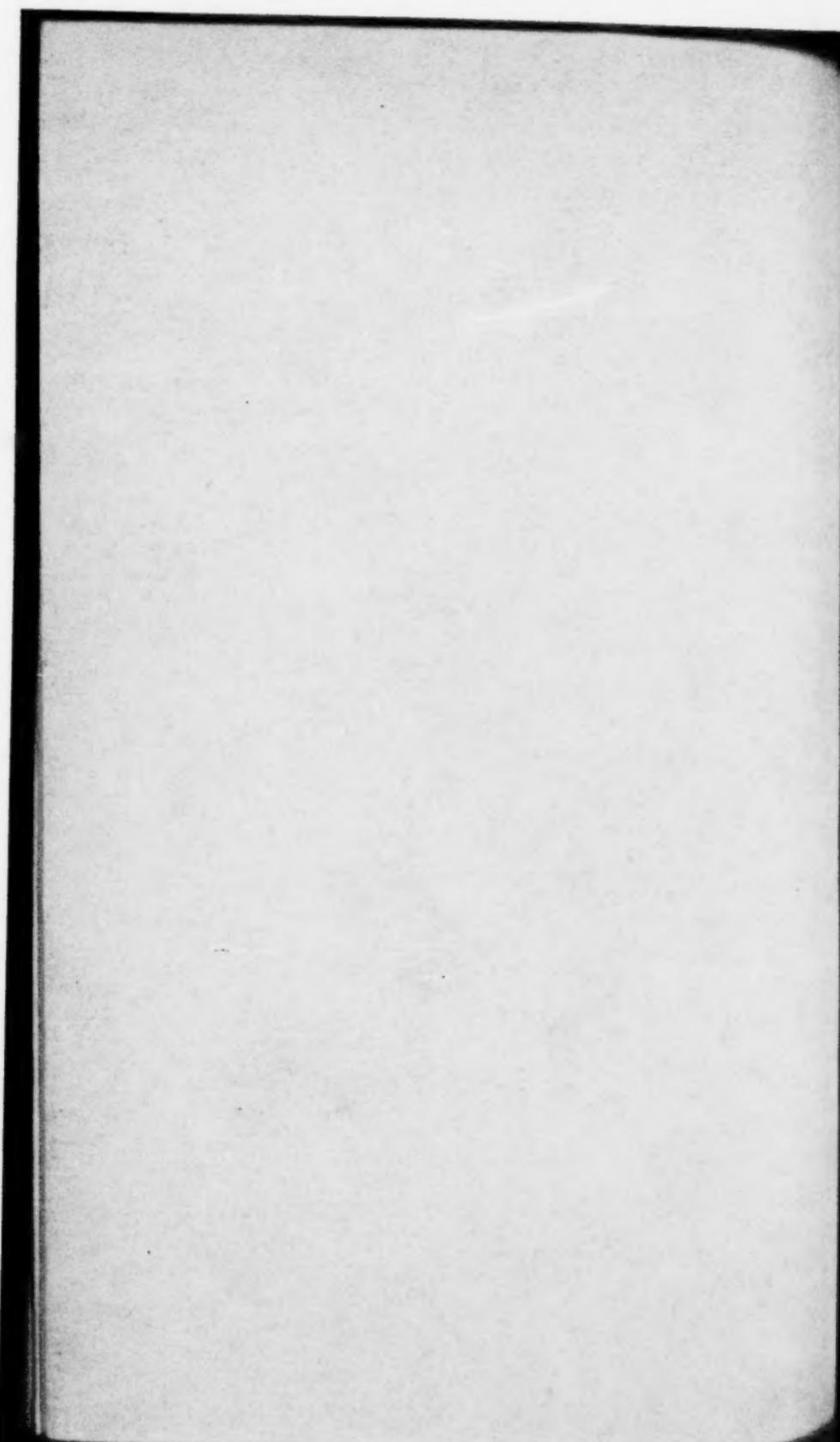
In my opinion the judgment is right and should be affirmed, with costs.

canal adjacent to Black Rock harbor. At the time the grant was made the bridge had been built. It rested on piers in the river. The grant, of course, was subject to visible rights 200 then existing and theretofore obtained. These rights could not be destroyed by a grant from the state to the United States. As before indicated, the United States could, before acquiring the grant, have compelled the defendant to remove the bridge. It could have done this just as well before the grant was made as it could afterwards. The power to do this existed independent of the grant and in no way depended upon it. It was one which the Federal government inherently possessed for the purpose of controlling interstate and foreign commerce. (*Escanaba Co. v. Chicago*, 107 U. S. 678; *Cummings v. Chicago*, 188 U. S. 410.)

In the Escanaba case the question was as to the validity of the regulations made by the city of Chicago in reference to the closing, between certain hours of each day, of bridges across the Chicago river. Those regulations were alleged to be inconsistent with the power of Congress over interstate commerce. The court brushed aside such contention, saying: "The Chicago river and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation. But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries * * *. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. * * * But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary." (p. 683.)

The case now before us, so far as the contention is made that the Federal government has assumed exclusive control of the bridge, is governed, as it seems to me, by *Cummings v. Chicago* (*supra*) and the authorities there cited. In that case the Calumet river was improved by the Federal government, but before such improvements were made the government required a conveyance to be made to it by owners of the land fronting on the river. With the consent of the secretary of war the plaintiffs commenced to build a dock in the river adjacent to their property, without obtaining a permit from the department of public works of the city of Chicago, as required by an ordinance, and the court held that they were subject to the ordinance and before the dock could be built had to obtain the city's consent. Mr. Justice Harlan, delivering the opinion of the court (and what he said is equally applicable to the question here presented) said: "The general proposition upon which

BLUEPRINT
TOO
LARGE
FOR
FILMING



Hisecock, Ch. J., Chase, Pound, Crane and Andrews, JJ., concur;
Hogan, J., concurs in result.
Judgment affirmed.

[Endorsed:] People v. International Bridge Co. McLaughlin, J.
Filed Jun- 25, 1918, Clerk's Office, Albany County, N. Y.

203

Vol. 3.

STATE OF NEW YORK:

Court of Appeals.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff-Respondent,
vs.

INTERNATIONAL BRIDGE CO., Defendant-Appellant.

Exhibits.

Merton E. Lewis, Attorney-General, Attorney for Plaintiff-Respondent, Capitol, Albany, N. Y.

Moot, Sprague Brownell & Marey, Attorneys for Defendant-Appellant, 302 Erie Co. Bank Bldg., Buffalo, N. Y.

Albany County, N. Y., Clerk's office. Filed Jun- 22, 1918.

(Here follow blue prints marked pp. 204 to 207, inclusive.)

208

No. 4.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable
the Justices of the Supreme Court of the State of New York,
Greeting:

Because in the record and proceedings, as also in the rendition of
the judgment of a plea which is in the said Supreme Court of the
State of New York before you or some of you, upon remittitur from
the Court of Appeals, being the highest court of law or equity of
the said state in which a decision could be had in the said suit be-
tween People of the State of New York and International Bridge
Company, wherein was drawn in question the validity of a treaty
or statute of or an authority exercised under the United States and
the decision was against their validity; or wherein was drawn in
question the validity of a statute of or an authority exercised under
said state on the ground of their being repugnant to the Constitu-
tion, treaties or laws of the United States, and the decision was in
favor of such their validity, or wherein any title, right, privilege or
immunity was claimed under the Constitution or any treaty or stat-
ute of or commission held or authority exercised under the United
States, and the decision was against the title, right, privilege or
immunity especially set up or claimed under such Constitution,
treaty, statute, commission or authority, a manifest error hath hap-
pened to the great damage of the said International Bridge Com-
pany as by its complaint appears. We being willing that error, if
any hath been, should be duly corrected and full and speedy justice
done to the parties aforesaid in this behalf, do command you, if
judgment be therein given, that then under your seal, distinctly and
openly, you send the record and proceedings aforesaid, with all
things concerning the same, to the Supreme Court of the

209 United States, together with this writ, so that you have the
same in the said Supreme Court at Washington within thirty
days from the date thereof, that the record and proceedings aforesaid
being inspected, the said Supreme Court may cause further to
be done therein to correct that error what of right and according
to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the
United States, the 11th day of June, in the year of our Lord, one
thousand nine hundred and eighteen.

[Seal United States District Court, N. Dist. of New York.]

W. S. DOOLITTLE,
*Clerk of the District Court of the United
States for the Northern District of New York.*

Allowed by

FRANK H. HISCOCK,

*Chief Judge of the Court of Appeals
of the State of New York.*

210 [Endorsed:] Supreme Court of the U. S. International Bridge Co., Pltf. in Error vs. People of the State of New York, Deft. in Error. Original. Writ of Error. Moot, Sprague, Brownell & Marey, Attorneys for Pltf. in Error. Office and P. O. Address 45 Erie County Savings Bank Building Buffalo, N. Y. Filed June 12, 1918 in Albany Co. clerk's office.

211 No. 5.

Supreme Court of the United States.

INTERNATIONAL BRIDGE COMPANY, Plaintiff in Error,
against

PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

Know All Men By These Presents, That International Bridge Company, as principal, and The Guarantee Company of North America, as surety, are held and firmly bound unto the People of the State of New York, in the sum of Three Thousand Dollars (\$3,000.00) to be paid to the said People of the State of New York, to which payment well and truly to be made we bind, ourselves, jointly and severally by these presents, sealed with our seals and dated this 29th day of May, 1918.

[SEAL.] INTERNATIONAL BRIDGE COMPANY,

(Signed) By M. E. GILLEN,

Vice-President.

[SEAL.] THE GUARANTEE COMPANY
OF NORTH AMERICA.

DANIEL J. TOMPKINS,

Resident Secretary.

WARD E. FLAXINGTON,

Attorney-in-Fact.

611,645.

Whereas, the above named plaintiff in error, International Bridge Company, has sued out of a Writ of Error from the United States Supreme Court to the Supreme Court of the State of New York to reverse the judgment of the Court of Appeals of the State of New York rendered on the 12th day of March, 1918, affirming the judgment of affirmance entered in Albany County Clerk's Office on the 2nd day of August, 1917, on an order of the Appellate Division of the Supreme Court, Third Department, entered on the 7th 212 day of July, 1917, which affirmed the judgment of the Supreme Court, Albany County, entered in Albany County Clerk's Office on the 20th day of November, 1916, in the suit of the People of the State of New York against International Bridge Company, and the record in the said action having been remitted by said Court of Appeals to the Supreme Court of the State of New York,

Albany County, according to the form of the statute in such case made and provided, to be enforced according to law and which record now remains in said Supreme Court, and by an order of the Supreme Court entered on the 23rd day of March, 1918, in Albany County Clerk's Office, said judgment of the Court of Appeals was made the judgment of the Supreme Court and judgment of affirmance was entered on said remittitur in Albany County Clerk's Office on said same day.

Now, Therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said Writ of Error to effect and answer all costs and damages that may be adjudged, if they shall fail to make good their plea, then this obligation is to be void, otherwise to remain in full force and effect.

(Signed) INTERNATIONAL BRIDGE COMPANY,

By M. E. GILLEN,

Vice-President.

[SEAL.]

THE GUARANTEE COMPANY
OF NORTH AMERICA,

DANIEL J. TOMPKINS,

Resident Secretary.

WARD E. FLAXINGTON,

Attorney-in-Fact.

Approved this 11th day of June, 1918.

(Signed) FRANK H. HISCOCK,

Chief Judge of the Court of Appeals.

213 STATE OF NEW YORK,

City and County of New York, ss:

On this fifth day of June, one thousand nine hundred and eighteen before me personally came Ward E. Flaxington, to me known and by me known to be an Attorney-in-Fact of The Guarantee Company of North America, the corporation described in and which executed the annexed Bond on behalf of the International Bridge Company and the said Ward E. Flaxington being by me duly sworn, did deposit and say that he resides in the City of New York, in the State of New York; that he is an Attorney-in-Fact of said The Guarantee Company of North America, and knows the corporate seal thereof; that the seal affixed to the said annexed instrument is such corporate seal and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed said annexed instrument as an Attorney-in-Fact of said Company by like order and authority; and that he is acquainted with Daniel J. Tompkins of the City of New York, and knows him to be the Resident Secretary of said Company and that the signature of said Daniel J. Tompkins subscribed to said annexed instrument is in the genuine handwriting of said Daniel J. Tompkins, and was thereto subscribed by order and authority of said Board of Directors and in the deponent's presence and that said Company is duly incorporated under the laws of the

Dominion of Canada and is duly authorized under the laws of the State of New York to execute said annexed instrument, and that the assets of said Company within the United States, unencumbered and liable to execution, exceed its debts, claims and liabilities of every nature whatsoever by more than the sum of seven hundred and fifty thousand dollars, and that the attached statement of said Company's assets and liabilities, signed by deponent, is true and correct.

(Signed)

WARD E. FLAXINGTON.

Subscribed, sworn to and Acknowledged before me on the date above written.

(Signed) HARRY GORDON,

[SEAL.] Notary Public, Kings County, No. 63.

Certificate filed in New York County No. 162.

Commission expires March 30, 1920.

214 [Endorsed:] Supreme Court of the United States. International Bridge Company, Plaintiff in Error, vs. People of the State of New York, Defendant in Error. (Certified Copy) Bond. Recorded and filed, Albany County Clerk's Office on the 12th day of June, 1918, at 10:00 A. M., in Book of Bonds No. 12, at page 497. L. C. Warner, Clerk.

215

No. 6.

In the Supreme Court of the United States.

INTERNATIONAL BRIDGE COMPANY, Plaintiff in Error,

against

PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

On reading the petition of International Bridge Company for writ of error and the assignment of errors, and upon due consideration of the record of said cause;

It Is Ordered, That a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of New York, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States, in accordance with law, upon condition that the said International Bridge Company, petitioner and plaintiff in error, give security in the sum of Three Thousand (\$3,000.00) Dollars; that the said plaintiff in error shall prosecute said writ of error to effect, and, if said plaintiff in error fail to make his plea, shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error now presenting a bond in the sum of Three Thousand (\$3,000.00) Dollars, with The Guarantee Com-

pany of North America, as surety, it is ordered that the same be and hereby is duly approved.

In Witness Whereof, I have hereunto set my hand this 11th day of June, 1918.

FRANK H. HISCOCK,
*Chief Judge of the Court of Appeals of
the State of New York.*

216 To the Hon. Frank S. Hiscock, Judge of the Court of Appeals

And now comes the appellant, International Bridge Company, and represents that on the 12th day of March, 1918, final judgment was duly rendered by the Court of Appeals, affirming the judgment of affirmance entered in Albany County Clerk's office on the 2nd day of August, 1917, on an order of the Appellate Division of the Supreme Court, Third Department, entered on the 7th day of July, 1917, which affirmed the judgment of the Supreme Court, Albany County entered in Albany County Clerk's office on the 20th day of November, 1916, in favor of the plaintiff, in a suit at law, wherein the People of the State of New York were plaintiff and International Bridge Company was defendant, and awarding costs in favor of plaintiff.

That the Court of Appeals, having adjudged as aforesaid, remitted the record in said cause to the Supreme Court of the State of New York, Albany County, according to the form of the statute in such case made and provided, to be enforced according to law and which record now remains in the said Supreme Court.

That by an order of the Supreme Court, entered on the 23rd day of March, 1918, in Albany County Clerk's Office, said judgment of the Court of Appeals was made the judgment of the Supreme Court and judgment of affirmance was entered on said remittitur in Albany County Clerk's office on said same day.

That this is an action brought by the People of the State of New York, to recover \$500.00 penalties accruing between January 1st and January 10, 1916, with interest thereon, because of the failure of the appellant, International Bridge Company, to comply with an act of the Legislature of the State of New York, known and designated as Chap. 666 of the Laws of 1915, and entitled, "An Act to

217 amend Chap. 753 of the Laws of 1857, entitled, 'An Act to incorporate the International Bridge Company,' in relation to the construction of a roadway and pathway and tolls for using the same" which act required the appellant, International Bridge Company to construct before January 1, 1916, a roadway for vehicles and a pathway for pedestrians upon the Black Rock Harbor draw of its bridge across the Niagara River between the City of Buffalo, N. Y. and Canada, and which fixed the maximum tolls to be charged by appellant for the use of said footpath and roadway and imposed a penalty of \$50.00 per day in case of appellant's failure to complete said bridge on or before said 1st day of January, 1916, for each day that appellant should be in default.

A 1 your petitioner avers that in its answer it expressly charged that said Act of the Legislature of New York, to wit: Chap. 666 of the Laws of 1915 was unconstitutional and impaired the obligation of contracts, to wit: the franchises granted to your petitioner by the Legislature of the State of New York and by the Parliament of Canada in the acts of its incorporation, and attempted to impose upon your petitioner burdens not imposed as conditions of said franchises, when the same were granted, to wit: the obligation to maintain a footpath and roadway across the Black Rock Harbor draw of its bridge, and to maintain a bridge and give a passageway from the City of Buffalo to Squaw Island, and contravened Article I, Sec. 10, Subdivision 1 of the Constitution of the United States, and deprived your petitioner of its property without due process of law, and contravened the first section of the 14th Amendment to the Constitution of the United States.

And your petitioner, in its answer, expressly charged that said act of the Legislature of New York was unconstitutional and deprived your petitioner of its property without due process of law because the tolls fixed by the said act for the use of said roadway and
218 pathway are so low and inadequate as to be confiscatory, and said act provides that no charge shall be made for the use thereof in certain instances and that said act contravened the first section of the 14th Amendment to the Constitution of the United States.

And your petitioner in its said answer expressly charged that said Act of the Legislature of New York was unconstitutional because it interfered with, regulated and burdened interstate and foreign commerce and contravened Article I, Sec. 8, Subdivision 3 of the Constitution of the United States, commonly known as the "Commerce Clause" and Acts of Congress passed under and by virtue of the power conferred upon Congress by the Constitution of the United States to regulate commerce with foreign nations and among the several states, in particular the act passed by Congress on June 30, 1870, entitled Chap. 176 of the Acts of 1870, authorizing your petitioner to construct and maintain a bridge across the Niagara River from the City of Buffalo to Canada, and the act passed by Congress on June 23, 1874, entitled Chap. 475 of the Acts of 1874 approving the modifications in the plans of said bridge and declaring said bridge as constructed to be a lawful structure; and the Act of Congress known as the Rivers & Harbors Act, approved June 13, 1902, and the Act of Congress known as the Rivers & Harbors Act, approved March 3, 1905, providing for the improvement of Black Rock Harbor by the United States, and Acts of Congress of subsequent years making further appropriations for such improvement of Black Rock Harbor, to wit: the Congressional Sundry Appropriations Act of 1906, being Chap. 3914 of the Acts of 1906; the Rivers & Harbors Act of 1907, being Chap. 2509 of the Acts of 1907; the Congressional Sundry Appropriations Act of 1907, being Chap. 2918 of the Acts of 1907; the Rivers & Harbors Act of 1909, being Chap. 264 of the Acts of 1909, and the Rivers & Harbors Act of 1910, being Chap. 382 of the Acts of 1910, and the general act relating to bridges over navigable rivers, to wit: Section 9 of the Rivers &

210 INTERNAT'L BRIDGE CO. VS. PEOPLE, ETC., NEW YORK.

Harbors Act, Approved March 3, 1899, being Chap. 425 of the Act of 1899.

219 That in said suit, and at the trial thereof, your petitioner claimed the right, title, privilege and immunity under said Act of Congress above specified, and under Section 9 of the Act of Congress approved March 3, 1899, entitled Chap. 425 of the Acts of 1899, to maintain its bridge as constructed and approved by Congress and by the Secretary of War, as an instrumentality of interstate and foreign commerce exclusively, without altering the same as required by said Act of the Legislature of New York, to wit: Chap. 666 of the New York Laws of 1915. That notwithstanding these facts, the Court of Appeals decided against the title, right, privilege and immunity thus specially set up and claimed by your petitioner and your petitioner shows that said judgment and decision and interpretation of said Acts of Congress were and are repugnant to the said Constitution and laws of the United States.

That in said suit and upon the hearing of said appeal in the Court of Appeals of the State of New York, your petitioner claimed the right, title, privilege and immunity under treaty between the United States and Great Britain concerning Boundary Waters between the United States and Canada, proclaimed May 13, 1910, to maintain its bridge as constructed and approved by Congress and by the Secretary of War across the Niagara River at Black Rock Harbor, which are boundary waters between the United States and Canada governed by said treaty without altering the same as required by said Act of the Legislature of New York, to wit: Chapter 666 of the New York Laws of 1915; that notwithstanding these facts the Court of Appeals decided against the title, right, privilege and immunity thus specially set up and claimed by your petitioner and your petitioner shows that said judgment and decision were and are repugnant to said treaty and to the constitution and laws of the United States.

220 And your petitioner further avers that in the aforesaid judgment and proceeding certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors which is filed herewith.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this case to the Supreme Court of the State of New York which has the custody of the record in this case for the correction of errors so complained of and that a transcript of the record and proceedings and papers in this cause, duly authenticated by the Clerk of said Supreme Court to wit: the County Clerk of Albany County, may be sent to the Supreme Court of the United States as provided by law.

Dated June 8th, 1918.

INTERNATIONAL BRIDGE COMPANY,
By HENRY W. SPRAGUE, *Director.*

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Petitioner & Plaintiff in Error.

Office & P. O. Address, 302 Erie County Bank Bldg., Buffalo, N.Y.

221 STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

Henry W. Sprague, being duly sworn, says that he is an officer, to wit: a Director of the International Bridge Company, plaintiff in error and petitioner herein, and deponent is also a member of the firm of Moot, Sprague, Brownell & Marcy, attorneys for said petitioner; that deponent has read the foregoing petition and the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true;

That the reason why this verification is made by deponent and not by said petitioner, is that none of the officers of said petitioner, International Bridge Company, are within the County of Erie, where their said attorneys reside and have their office, with the exception of deponent.

That all of the material allegations of said petitioner are within the personal knowledge of deponent.

HENRY W. SPRAGUE.

Subscribed and sworn to before me this 8th day of June, 1918.

FRANCES SCHEFFER,
Notary Public in and for Erie Co., New York.

222 [Endorsed:] B-153. P-111. Supreme Court of the United States. International Bridge Company, Plaintiff in Error, vs. People of the State of New York, Defendant in Error. Original Petition & Order. Moot, Sprague, Brownell & Marcy, Attorneys for Pltf. in Error. Office and P. O. Address 302 Erie County Savings Bank Building, Buffalo, N. Y. Albany County, N. Y. Filed Jun-12, 1918. Clerk's Office.

223 No. 7.

In the Supreme Court of the United States.

INTERNATIONAL BRIDGE COMPANY, Plaintiff in Error,
 against

PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

Error to the Supreme Court of the State of New York.

And now comes International Bridge Company, Petitioner and Plaintiff in Error, by Moot, Sprague, Brownell & Marcy, its attorneys, and in connection with its petition for a writ of error shows that in the record and proceedings and in the rendering of the judgment and decision of the Court of Appeals of the State of New York in the above entitled cause manifest error has intervened to the prejudice of this petitioner and plaintiff in error in this, to-wit:

First: The court erred in holding that the Act of the Legislature of the State of New York, to-wit: Chapter 666 of the Laws of 1913, entitled "An Act to amend Chapter 753 of the Laws of 1857, entitled 'An Act to incorporate the International Bridge Company' in relation to the construction of a roadway and pathway and tolls for using the same" was constitutional and did not impair the obligation of contracts, to wit: the franchises granted to your petitioner by the Legislature of the State of New York and by the Parliament of Canada in the acts of its incorporation, and did not contravene Article I, Section 10, Subdivision 1 of the Constitution of the United States, and did not deprive your petitioner of its property without due process of law and did not contravene the first section of the

14th Amendment to the Constitution of the United States.

224 Second: The Court erred in holding that said Act of the Legislature of New York was unconstitutional, and did not de-

prive your petitioner of its property without due process of law, and was not confiscatory by reason of the tolls fixed in and by said act for the use of said roadway and pathway, and the provision that a charge should be made for the use thereof in certain instances, and did not contravene the first section of the 14th Amendment to the Constitution of the United States.

Third: The Court erred in holding that the assets of your petitioner, devoted wholly to interstate and foreign commerce and to furnishing an instrumentality therefor, and its earnings derived wholly from such interstate and foreign commerce and from furnishing an instrumentality therefor, might be considered in determining whether the tolls fixed by said act for intrastate commerce, and for the use of an instrumentality for such commerce, were confiscatory.

Fourth: The said Court of Appeals erred in holding that said Act of the Legislature of New York was unconstitutional, and did not contravene Article I, Section 8, Subdivision 3 of the Constitution of the United States, and Acts of Congress passed under and by virtue of the power conferred on Congress by the Constitution of the United States to regulate commerce with foreign nations and among the several states, in particular the act passed by Congress on June 2, 1870, entitled Chap. 176 of the Acts of 1870, authorizing your petitioner to construct and maintain a bridge across the Niagara River from the City of Buffalo to Canada, and the act passed by Congress on June 23, 1874, entitled Chap. 475 of the Acts of 1874, approving the modifications in the plans of said bridge and declaring said bridge as constructed to be a lawful structure; and the Act of Congress known as the Rivers & Harbors Act, approved June 13, 1905, and the Act of Congress known as the Rivers & Harbors Act, approved March 3, 1905, providing for the improvement of Black Rock Harbor by the United States, and Acts of Congress

225 subsequent years making further appropriations for such improvement of Black Rock Harbor, to wit: the Congressional

Sundry Appropriations Act of 1906, being Chap. 3914 of the Acts of 1906; the Rivers & Harbors Act of 1907, being Chap. 2509 of the Acts of 1907; the Congressional Sundry Appropriations Act of 1907, being Chap. 2918 of the Acts of 1907; the Rivers & Har-

Act of 1909, being Chap. 264 of the Acts of 1909, the Rivers & Harbors Act of 1910, being Chap. 382 of the Acts of 1910; and the general act relating to bridges over navigable waters, to wit: Section 9 of the Rivers & Harbors Act, approved March 3, 1899, being Chap. 425 of the Act of 1899.

Fifth: The said Court of Appeals erred in holding that said Act of the Legislature of New York was unconstitutional and did not contravene the treaty entered into by and between the United States and Great Britain concerning Boundary Waters between the United States and Canada proclaimed May 13, 1910, assuming jurisdiction over and regulating navigation upon said boundary waters, including the Niagara River and all arms thereof.

Sixth: The said Court of Appeals erred in rendering decision against the title, right, privilege and immunity set up and claimed by plaintiff in error under the said Acts of Congress hereinabove specified in the fourth assignment of error herein, to maintain and operate its bridge as authorized, constructed and approved by Congress and by the Secretary of War, as an instrumentality of interstate and foreign commerce, viz; a railroad bridge from Buffalo to Canada, and in holding that the Legislature of the State of New York, by said Chap. 666 of the Laws of 1915, might compel the plaintiff in error to alter its bridge by constructing a roadway and pathway on the Black Rock Harbor draw thereof, and might compel the plaintiff in error to maintain and operate its said bridge

226 as a bridge for pedestrians and vehicles between the City of Buffalo and Squaw Island in the State of New York.

Seventh: The said Court of Appeals erred in rendering decision against the title, right, privilege and immunity set up and claimed by plaintiff in error under said treaty between the United States and Great Britain concerning Boundary Waters between the United States and Canada proclaimed May 13, 1910, to maintain and operate its bridge as authorized, constructed and approved by Congress without interference from the Legislature of the State of New York.

By reason whereof this petitioner and plaintiff in error prays that the said judgment of the Court of Appeals, thereafter remitted to and made the judgment of the Supreme Court of the State of New York, may be reversed and the complaint of the defendant in error dismissed.

Dated Buffalo, N. Y., the 8th day of June, 1918.

MOOT, SPRAGUE, BROWNELL & MARCY,

Attorneys for Petitioner and Plaintiff in Error.

227 [Endorsed:] Supreme Court of the U. S. International Bridge Co., Pltf. in Error, vs. People of the State of New York, Deft. in Error. Original Assignment of Errors. Moot, Sprague, Brownell & Marcy attorneys for Pltf. in Error. Office and P. O. Address 302 Erie County Savings Bank Building Buffalo, N. Y. Filed Jun-12, 1918, Clerks Office, Albany County, N. Y.

228

No. 8.

*Citation.*UNITED STATES OF AMERICA, *ss:*

To the People of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to writ of error filed in the Clerk's office of the Supreme Court of the State of New York, wherein International Bridge Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the hand and seal of the Honorable, the Chief Judge of the Court of Appeals this 11th day of June, in the year of our Lord One thousand nine hundred and eighteen.

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals.

Attest:

W. S. DOOLITTLE,
*Clerk of the District Court of the United States
for the Northern District of New York.*

229 [Endorsed:] Supreme Court of the U. S. International Bridge Co., Pltf. in Error, vs. People of the State of New York, Deft. in Error. Original Citation. Moot, Sprague, Brown & Marey, Attorneys for Pltf. in Error. Office and P. O. Address 302 Erie County Savings Bank Building, Buffalo, N. Y. Albany County, N. Y., Clerk's Office. Filed June 12, 1918.

230

No. 9.

At a Special Term of the Supreme Court, Held in and for the County of Albany, at the Court-house, in the City of Albany, N. Y., the 23rd Day of March, 1918.

Present: Hon. William P. Rudd, Justice.

PEOPLE OF THE STATE OF NEW YORK, Plaintiff,

vs.

INTERNATIONAL BRIDGE COMPANY, Defendant.

The above named defendant having appealed to the Court of Appeals from a judgment entered upon order of the Appellate Division

of the Supreme Court, in and for the Third Judicial Department, entered herein on August 2nd, 1917, in the office of the Clerk of the County of Albany, whereby a judgment of this court in favor of the plaintiffs and against the defendants for the sum of \$744.42, entered November 20th, 1916, was in all respects affirmed with costs taxed at the sum of \$163; and the said appeal having been duly argued in the Court of Appeals and after due deliberation the Court of Appeals having ordered and adjudged that the judgment so appealed from be affirmed with costs, and having further ordered that the proceedings therein be remitted to the Supreme Court there to be proceeded upon according to law,

Now, on reading and filing the remittitur from the Court of Appeals herein, and upon motion of Merton E. Lewis, Attorney-General, attorney for plaintiffs, it is

231 Ordered, that the order and judgment of the Court of Appeals be and the same are hereby made the order and judgment of this court.

Enter.

WM. P. RUDD, J. S. C.

232 [Endorsed:] B. 152. P. 396. Supreme Court Albany County. People of the State of New York, Plaintiffs, vs. International Bridge Company, Defendant. Original. Order for Judgment on Remittitur. Merton E. Lewis, Attorney-General, Attorney for — — —, Capitol, Albany, N. Y.

233

No. 10.

Supreme Court, Albany County.

PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,

vs.

INTERNATIONAL BRIDGE COMPANY, Defendant.

The issues in this action having been regularly brought on for trial at a trial term of this court held on the 20th day of June, 1916, and having been determined in favor of the plaintiffs, and a decision having been filed on the 18th day of November, 1916 directing judgment for the plaintiff, and judgment having been entered thereon for \$744.42 on November 20th, 1916, and the defendant having appealed to the Appellate Division of the Supreme Court for the Third Judicial Department from said judgment and said Appellate Division having affirmed said judgment and made an order of affirmance with costs at the term commencing May 1st, 1917 and a judgment of affirmance having been entered upon said order in the office of the Clerk of Albany County on August 2nd, 1917, which judgment also awarded to the plaintiffs against the defendants costs taxed at \$163.00 and the defendants having appealed therefrom to the Court of Appeals, and the said Court of Appeals having sent hither its remittitur filed herein this day, by which it appears that the said Court of Appeals has affirmed the said judgment in all

things with costs and has given judgment accordingly, and has remitted the judgment of said Court of Appeals to this court to be enforced according to law; and this court having, by an order duly entered herein this day, ordered that said judgment be made 234 the judgment of this court and the plaintiffs' costs having been duly taxed at the sum of \$176.00 as per bill of costs filed with the Clerk of this court on this day,

Now, on motion of Merton E. Lewis, Attorney-General, attorney for plaintiff, it is

Ordered, adjudged and decreed that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court and it is further

Ordered, adjudged and decreed that the respondents herein recover from the relator their costs of \$176.00 as per the bill of costs filed with the clerk of this court on this day.

Judgment this 23rd day of March, 1918.

L. C. WARNER, Clerk.

235 [Endorsed:] B. 109. P. 84. Supreme Court, Albany County. People of the State of New York, Plaintiffs, v. International Bridge Company, Defendant. Original Judgment on Remittitur of Court of Appeals. Merton E. Lewis, Attorney-General, Attorney for — — —, Capitol, Albany, N. Y.

236

No. 11.

Supreme Court of the United States.

INTERNATIONAL BRIDGE COMPANY, Plaintiff-in>Error,
against

PEOPLE OF THE STATE OF NEW YORK, Defendant-in>Error.

The plaintiff in error, International Bridge Company, on the 12th day of June, 1918, filed with the undersigned, Luther C. Warner as Clerk of the Supreme Court of Albany County, in the above entitled action, the following documents:

1st. The original order, dated June 11th, 1912, signed by Hon. Frank S. Hiscock, Chief Judge of the Court of Appeals of the State of New York, allowing writ of error herein from the Supreme Court of the United States to the Supreme Court of the State of New York together with original petition and assignment of errors upon which said order was granted.

2nd. The original bond, approved by Hon. Frank S. Hiscock, Chief Judge of the Court of Appeals of the State of New York on the 11th day of June, 1912, given as security for the prosecution of the writ of error in the United States Supreme Court.

3rd. The original writ of error issued by W. S. Doolittle, Clerk of the District Court of the United States for the Northern District of New York on the 11th day of June, 1912, and said plaintiff in error thereafter filed with the undersigned one copy of said writ of error for the files of my office.

4th. Original citation, dated the 11th day of June, 1918, addressed to the people of the State of New York, defendant in error, signed by Hon. Frank S. Hiscock, Chief Judge of the Court of Appeals of the State of New York, and attested by W. S. Doolittle, Clerk of the District Court of the United States for the Northern District of New York.

In witness whereof, I have hereunto set my hand and affixed the official seal of the Supreme Court, at my office in the City of Albany, State of New York, this 26th day of June, 1918.

[Seal Albany County July, 1847.]

L. C. WARNER,
*County Clerk of Albany County and Clerk of
 the Supreme Court in and for Said County.*

238

No. 12.

STATE OF NEW YORK,

Supreme Court, Albany County, ss:

I, Luther C. Warner, County Clerk of Albany County, also Clerk of the Supreme and County Courts, the same being Courts of Record held therein, do hereby certify that the foregoing volume and the present volume constitute a true, full and complete transcript of the record and proceedings consisting of two volumes, including this present volume, to wit:

Volume 1, entitled "Record on Appeal", containing pages 1 to 194 inclusive, exclusive of this present page in a certain cause, entitled in this Court—"People of the State of New York, vs. International Bridge Company" and also the opinion of the Court of Appeals, rendered in said cause, as the same now appears on file in my office.

Volume 2, entitled "Exhibits", containing 4 blue prints of plans, maps, etc., without paging.

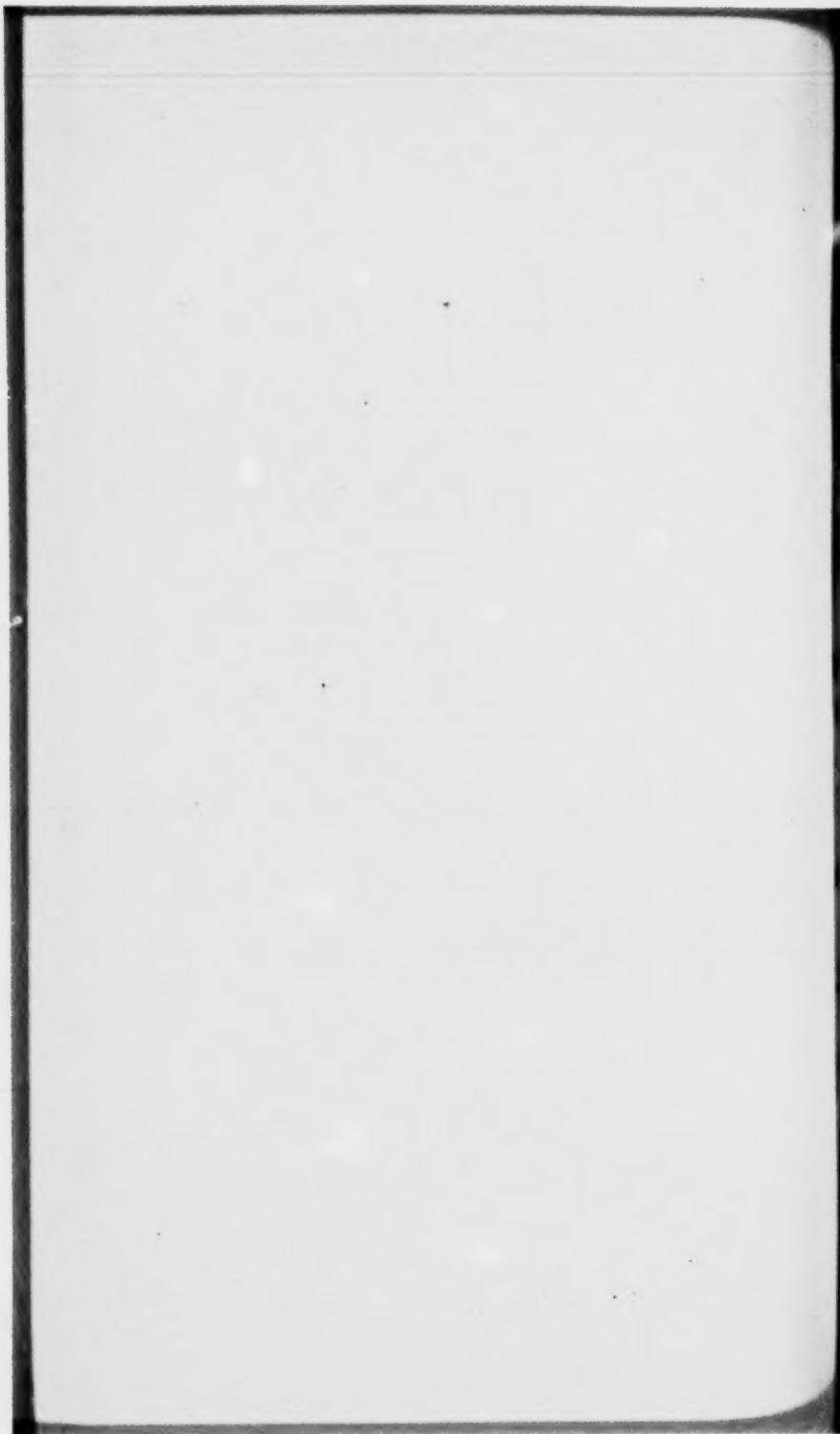
The original writ of error, copy of bond, order allowing writ of error, petition and assignment of errors and citation are returned with the transcript of the record. Also order for judgment on remittitur and judgment on remittitur of Court of Appeals.

In testimony whereof, I have hereunto set my hand and affixed the official seal of the said County and Courts, at Albany, in said State, this 26th day of June, 1918.

[Seal Albany County, July, 1847.]

L. C. WARNER,
*Clerk of the County of Albany and Clerk of the
 Supreme Court of the State of New York in
 and for the County of Albany.*

Endorsed on cover: File No. 26,646. New York Supreme Court. Term No. 560. International Bridge Company, Plaintiff in Error, vs. The People of the State of New York. Filed July 15th, 1918. File No. 26,646.



OCT 13 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

No. 1

46

INTERNATIONAL BRIDGE COMPANY
Plaintiff in error

against

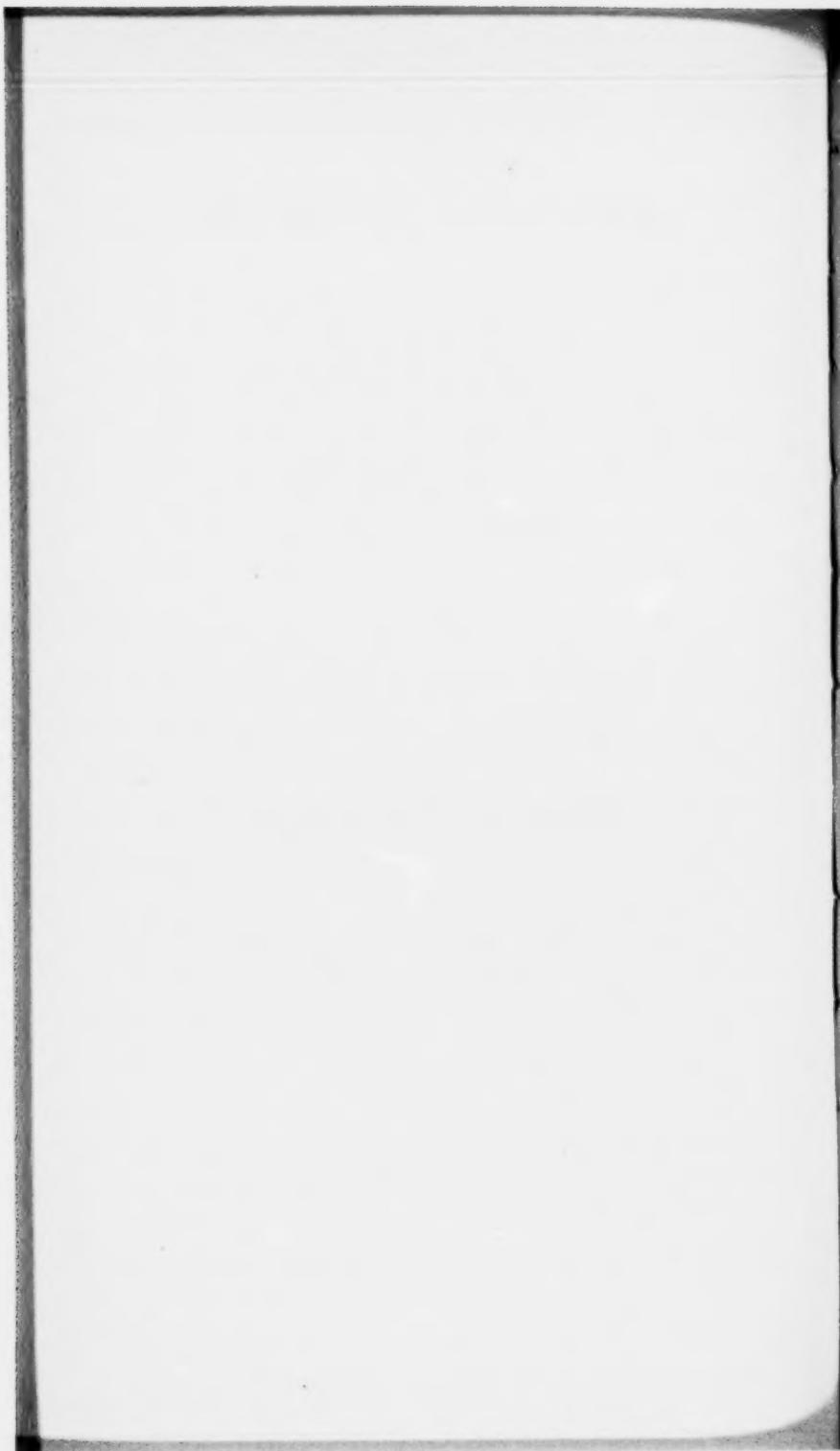
THE PEOPLE OF THE STATE OF NEW YORK

MOTION TO ADVANCE

CHARLES D. NEWTON
Attorney-General of New York
Attorney for Defendant in error

E. C. AIKEN
Of Counsel

MOOT, SPRAGUE, BROWNELL & MARCY
Attorneys for Plaintiff in error



SUPREME COURT OF THE UNITED STATES

INTERNATIONAL BRIDGE COMPANY,

Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW

YORK,

Defendants in Error.

To the Honorable Justices of this Court:

Now come the defendants in error herein, the People of the State of New York, and respectfully show:

This is a case in which a state is a party, and within the scope of revised statutes, section 949. There is reason why the cause should be advanced upon the calendar, as follows:

By chapter 666 of the Laws of 1915 of the State of New York, the charter of the International Bridge Company was amended by the addition of a section requiring the company to place a roadway and footpath upon part of its bridge, then used exclusively for railroad purposes. This addition was to be completed by January 1, 1916, upon pain of a penalty of fifty dollars a day for default thereafter. The Bridge Company challenged the constitutionality of the act, and after

ten days default, the attorney-general of the state brought this action for five hundred dollars penalties. The constitutionality of the statute was upheld in this action in Trial Term of the Supreme Court of New York, and the decision was unanimously affirmed by the Appellate Division and by the Court of Appeals. The defendant brought the case to this court on writ of error, in July 1918.

It is important to the state to have a prompt decision in this case, as the necessity for the roadway and footpath upon the bridge which caused the passage of the statute, is ever pressing. The resumption of peaceful activities since the close of hostilities and the return of the soldiers makes it now much more pressing than it was a year ago.

From the point of view of the plaintiff in error, a prompt decision is highly important, as penalties at the rate of fifty dollars a day (if the statute be constitutional) are accruing against it continuously.

Wherefore, the defendants in error move the advancement of this case upon the calendar and request that the Court set a day upon which argument will be heard.

CHARLES D. NEWTON,
Attorney-General of New York,
Attorney for Defendants in Error.

Albany, N. Y., October 6, 1919.

The plaintiff in error joins in the foregoing application.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
FILED

NOV 10 1919

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. [REDACTED] 46

INTERNATIONAL BRIDGE COMPANY

PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF
NEW YORK,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Petitioner.

ADELBERT MOOT,
Of Counsel.



INDEX

	PAGES
Act of N. Y., 1857, Incorporating the International Bridge Company.....	4, 5, 25, 35
Act of Canada, 1857, Incorporating the International Bridge Company.....	6, 7, 18-20, 26
Act of New York 1869, Authorizing Consolidation	7, 23, 26, 28, 30, 32
Act of Congress 1870, Authorizing Bridge...	8, 9, 27, 61-65, 85, 89, 114, 115
Act of Congress 1874, Declaring Bridge a Lawful Structure..	10, 24, 65, 86, 89, 91, 108, 115
Act of New York 1898, Acquiescing in form of Bridge	23, 26
Act of New York 1915, Requiring Construction of Highway on Black Rock Harbor Draw, giving access to Squaw Island.....	10-12, 25, 101, 115, 116
Acts relating to Bridges over Navigable Waters of United States.....	140-144
Approval of Plans by Secretary of War.....	65-68, 73-75
Assets devoted to Foreign and Interstate Commerce	48, 49, 57-59
Black Rock Harbor, Arm of Niagara River..	
	132, 144, 146-150
Black Rock Harbor, Conveyance by New York to United States.....	68-70
Black Rock Harbor, Exclusive Federal Jurisdiction over	70

- Black Rock Harbor, Improvement by Federal Government 68, 71-74
Boundaries, Power of United States Over... 116
Boundary Bridges, Decisions..... 87-96, 139, 140
Boundary Ferries, Decisions..... 98-101
Boundary Waters, Miscellaneous Structures in 96-98
Boundary Waters between United States and Canada, Treaty concerning..... 130-135
Bridge, Status of Commerce by 111, 112, 133
Bridge, International, Instrument of Foreign and Interstate Commerce..... 57, 62, 63, 112
Bridge, International, Physical Link with Foreign Nation..... 112, 113
Bridge, International, Unit in stronger sense than Railroad..... 107-110
Burton Act 134
- Canadian Act 1857, Incorporating International Bridge Co..... 6, 7, 18-20, 26
Canadian Court Construes Act as Permissive Only 21-23
Canadian Frontier, History of..... 127
Commerce by Bridge, Status of 111, 112, 133
Commerce Clause , Federal Jurisdiction of Bridge under 59-110
Commercee, Exercise by Congress of Power excludes State 60-65
Commercee, International Bridge Instrument of Foreign and Interstate..... 57, 62, 63
Committee on Foreign Affairs, Report of, re. Niagara River..... 134, 135
Cost of Highway Wing, Buffalo to Squaw Island 49-51

Cost of Operation, Highway Wing Buffalo to Squaw Island	50
Deed from New York to United States of Lands under Black Rock Harbor.....	68-71
Due Process of Law, Bridge Company Deprived of Property without.....	46-56
Earnings from Foreign and Interstate Commerce	48-49, 57-59
External Relations of United States Involved in Bridge across Niagara.....	110-129
Federal Jurisdiction over Bridge, Exclusive because External Relations Involved... .	110-129
Fenian Raid organized in Buffalo.....	127
Ferries across Boundary Waters, Decisions.	98-101
Foreign Act, Construction by Courts of Jurisdiction	21-23
Foreign Commerce, International Bridge Primarily Serves	112
Franchise, Bridge Company has none to Construct Bridge to Squaw Island.....	24-27, 74
Franchise, Cannot be Impaired under Reserve Power to Alter Corporate Charter..	37-46
Franchise of Bridge Company Impaired by New York Act of 1915.....	14-46
Franchise of Bridge Company Impaired by making Highway Compulsory	15-24
Franchise of Bridge Company Impaired by Requiring Bridge between Buffalo and Squaw Island.....	24-32
Franchise of Bridge Company Impaired by Reduction of Tolls.....	32-37

- Franchise to Bridge Niagara came from Congress 139-141
- History Canadian Frontier 127
- Historical Statement International Bridge Company 4
- Income Essence of Franchise 56
- Income from Highway Wing Buffalo to Squaw Island 54, 55
- International Bridge Company, an International Corporation 112
- International Bridge Company, Instrument of Foreign and Interstate Commerce 57, 62, 63, 112
- International Bridge, Physical Link with Foreign Nation 112, 113
- Legislation Concerning Bridge International in Character 112, 113
- Mexican Frontier, Disturbances along 128
- Miscellaneous Structures in Boundary Waters 96-98
- Navigable Waters Wholly within Single State, Cases Distinguished 141-146
- Niagara River, Commerce on Governed by Treaty 111, 130-132
- Niagara River, Exclusive Federal Jurisdiction over 133-135
- Niagara River, International Boundary 112, 146-150

INDEX

vii

- Opinion Court of Appeals, Federal Control.. 136-138
Opinion Court of Appeals, Impairment of Franchise 16
Opinion Court of Appeals, Tolls not Confiscatory 46, 47
- Physical Connection with Foreign Territory,
International Bridge is 112, 113
Physical Connection with Foreign Territory
cannot be established without consent of
United States 124, 125
Plans, Approved by Secretary of War. 65-68, 73-75
Pleadings 2, 3
Police Power Exercised by State Subordinate
to Constitution 151
- Railroad Cases 103-106
Report, Committee on Foreign Affairs re Ni-
agara River 134, 135
Reserve Power to Alter Corporate Charter,
Limitation of 37-46
Revenue Available from Highway, Buffalo to
Squaw Island 51-56
Rule of Property created by Decisions con-
struing Acts legalizing Bridges 91
- Secretary of War, Approval of Plans by
..... 65-68, 73-75
Secretary of War cannot confer Franchise. 74, 146
Specifications of Errors 12-14
Squaw Island, Character of 51-53
Squaw Island, Existing Commercial Develop-
ment 54

- Squaw Island, Franchise Impaired by Compelling Construction of Bridge to..... 24-32
Squaw Island, Plans for Development of... 53, 54
State cannot Supplement Acts of Congress.. 75-85
- Tolls approved by Congress..... 33-34
Tolls authorized by Acts of Incorporation,
 compared with tolls fixed by Act of 1915... 35
Tolls, Canadian Act authorized Directors to
 Fix 32, 33
Tolls, Confiscatory 46-56
Tolls, Franchise Impaired by Reduction of.. 32-37
Tolls Reduced 85 to 90%..... 35, 49
Treaty, Commerce on Niagara governed by..
 130-133
Treaty Power, Bridging Niagara subject of..
 111, 112
Treaty with Great Britain concerning Boundary Waters between United States and Canada 130-135

TABLE OF CASES

	PAGE
Alabama, Smith vs., 124 U. S. 465.....	77
Ames, Smyth vs., 169 U. S. 466.....	58
Arkansas, St. Louis S. W. Ry. Co. vs., 217 U. S. 136.....	103
Atlantic Coast Line v. Wharton, 207 U. S. 328	103
Attorney General v. International Bridge Co., 6 Ont. App. R., 537.....	18
Auditor General, Chicago & N. W. Ry. Co. vs., 53 Mich. 79.....	31
Baltimore & N. Y. R. Co., Decker vs., 30 Fed. R. 723	93, 139
Baltimore & N. Y. R. Co., Pennsylvania Ry. Co. vs., 37 Fed. R. 129.....	139
Baltimore & N. Y. R. Co., Stockton vs., 32 Fed. R., 9, App. dis., 140 U. S. 699.....	92, 139
Baltimore & Ohio Ry. Co., Interstate Com- merce Com. vs., 145 U. S. 263.....	22
Baltimore & Ohio Ry. Co. v. Interstate Com- merce Com. 221 U. S. 612.....	106
Blackwell, Seaboard Air Line Ry. vs., 244 U. S. 310	104
Boise City, Boise Water Co. vs., 230 U. S. 84.	44
Boise Water Co. vs. Boise City, 230 U. S. 84..	44
Bowman v. Chicago, etc. Ry Co., 125 U. S. 465	127, 133, 139
Bridge Co. vs. United States, 105 U. S. 470...	96
Bryan, City of New York vs., 196 N. Y. 165...	40
Butfield v. Lanahan, 192 U. S. 470.....	117, 127

Call, Long Sault Development Co. vs., 242 U. S. 272	41
Canada Southern Ry. Co. v. International Bridge Co., 8 Fed. R., 190.....	34, 65
Central R. R. Co. v. Georgia, 92 U. S. 675....	31
Charleston & W. Car. Ry. Co. v. Furniture Co., 237 U. S. 597.....	77
Chicago, Cummings vs., 188 U. S. 410.....	144, 150
Chicago, Escanaba Co. vs., 107 U. S. 678.....	146
Chicago, M. & St. P. Ry. Co. v. Tompkins, 176 U. S. 167.....	58
Chicago & N. W. Ry. Co. v. Auditor General, 53 Mich., 79.....	31
Chicago R. T. & P. Ry. Co. v. Elevator Co., 226 U. S. 426.....	61
Chicago, etc. Ry. Co., Bowman vs., 125 U. S. 465	127, 133
Chinese Exclusion Case, 130 U. S. 581.....	119
City of New York v. Bryan, 196 N. Y. 165....	40
Clinton Bridge, The, 10 Wallace, 454.....	90
Common Council, People ex rel Reynolds vs., 140 N. Y. 300.....	39
Commonwealth of Pennsylvania, Prigg vs., 16 Peters, 539	75
Coney Island R. R. Co. vs. Kennedy, 15 N. Y. App. Div. 588.....	39
Consolidated Gas Co., Wilcox vs., 212 U. S. 19	41, 49
Covington Bridge Co. v. Kentucky, 154 U. S. 204	36, 94
Crane Co., Looney vs., 245 U. S. 178.....	151
Cress, United States vs., 243 U. S. 316.....	70, 149
Crutcher v. Kentucky, 141 A. D. 47.....	127

Cumberland Telephone Co., Owensboro vs., 230 U. S. 58.....	42	
Cummings v. Chicago, 188 U. S. 410.....	144, 150	
Curtis, People v., 50 N. Y. 321.....	126, 133	
Decker v. Baltimore & N. Y. R. Co., 30 Fed. R.,		
723	93, 139	
DeCuir, Hall vs., 95 U. S. 485.....	76	
Delaware Railroad Tax, 18 Wallace 206.....	31	
Detroit United Ry. v. Michigan, 242 U. S. 238	15, 45	
Douglas v. Kentucky, 168 U. S. 488.....	15	
Duluth, Northern Pacific Ry. v., 208 U. S. 583.	15	
Duluth, Wisconsin vs., 96 U. S. 379.....	61, 72	
Elevator Co., Chicago R. T. & P. Ry. Co. vs., 226 U. S. 426.....	61	
Elmendorf v. Taylor, 10 Wheaton 152.....		22
Erie R. R. Co. vs. New York, 223 U. S. 671...	78	
Erie R. R. Co. vs. Winfield, 244 U. S. 170.....	82	
Escanaba Co. vs. Chicago, 107 U. S. 678.....	146	
Florida, Seaboard Air Line Ry. Co. vs., 208 U. S. 26.....		58
Fong Yue Ting vs. United States, 149 U. S. 698	121	
Fort, Hubbard vs., 188 Fed. R. 197.....	74, 96, 146	
Forty-three Gallons of Whiskey, United States vs., 93 U. S. 188.....	117	
Furniture Co., Charleston & N. Car. Ry. Co. vs., 237 U. S. 597.....	77	
Garrison, Greenleaf Lumber Co. vs., 237 U. S. 251	73	

Georgia, Central R. R., etc. Co. vs., 92 U. S.	
675	31
Gibbons vs. Ogden 9 Wheaton, 207	85, 109
Gilman v. Philadelphia, 3 Wallace, 713....	112, 133
Gloucester Ferry Co. vs. Pennsylvania, 114 U.	
S. 196	100
Grand Trunk & Western Ry. vs. South Bend,	
227 U. S. 544.....	15, 44, 15
Grand Trunk Ry. Co., Kiefer vs., 12 N. Y.	
App. Div., 2 ^d , Aff'd 153 N. Y. 688.....	84
Green Bay Co. v. Patton Paper Co., 172 U.S.	
58	71
Greenleaf Lumber Co. v. Garrison, 237 U. S.	
251	73
Gulf, Colorado & Santa Fe Co. v. Hefley, 158	
U. S. 98.....	61
Guyot, Hilton vs., 105 U. S. 113.....	22
159	
Hagerla vs. Mississippi River Power Co., 202	
Fed. R. 776.....	98, 141
Hall vs. De Cuir, 95 U. S. 485.....	76
Harlem R. Co., Muhlker vs., 197 U. S. 544.	91
Harris, New Orleans & N. W. R. R. Co. vs.,	
247 U. S. 367.....	83
Head Money Cases, 112 U. S. 580.....	117
Hefley, Gulf, Colorado & Santa Fe Co. vs., 158	
U. S. 98.....	61
Henderson v. New York, 92 U. S. 259.....	132
Hesterly, Ry. Co. vs., 228 U. S. 702.....	61
Hilton v. Guyot, 105 U. S. 113.....	22
Holmes v. Jennison, 14 Peters 540.....	124
Houston & Texas Ry. Co. v. United States,	
234 U. S. 342.....	106
Hovey, McDonald vs., 110 U. S. 619.....	22

TABLE OF CASES

v

Hubbard v. Fort, 188 Fed. R., 197.....	74, 96, 146
Hudson County, Port Richmond Ferry Co. vs., 234 U. S. 317.....	100
Hudson County, N. Y. C. R. R. Co. vs., 227 U. S. 248	100
Hudson R. C. R. Corp., People vs., 104 N. Y. Misc. 19; Affirmed 186 N. Y. App. Div. 602	91
International Bridge Co., Attorney General vs., 6 Ont. App. R. 537.....	18
International Bridge Co., Canada Southern Ry. Co. vs., 8 Fed. R. 190.....	34, 65
International Bridge Co., People of State of New York vs., 223 N. Y. 137.....	17, 47, 138
International Transit Co., Sault Ste. Marie vs., 234 U. S. 333.....	100
Interstate Commerce Commission v. Balti- more & Ohio Ry. Co., 145 U. S. 263.....	22
Interstate Commerce Commission, Baltimore & Ohio Ry. Co. vs., 221 U. S. 612.....	106
Interstate Transportation Co., St. Clair Coun- ty vs., 192 U. S. 454.....	101
Ives v. South Buffalo Ry. Co., 201 N. Y. 271..	37
Jasper, San Diego Land Co. vs., 189 U. S. 439	49, 56
Jennison, Holmes vs., 14 Peters, 540.....	124
Jensen, Southern Pacific Co. vs., 244 U. S. 205	83
Jessup, Trustees of Southampton vs., 162 N. Y. 122	37, 43
Joel, Rochester Turnpike Road Co. vs., 41 N. Y. App. Div. 43.....	42, 43

Kansas Southern Ry. v. Kaw Valley District, 233 U. S. 75.....	96
Kaw Valley District, Kansas Southern Ry. vs., 233 U. S. 75.....	96
Kennedy, Coney Island R. R. Co. vs., 15 N. Y. App. Div. 588.....	39
Kentucky, Covington Bridge Co. vs., 154 U. S. 204	36, 94
Kentucky, Crutcher, 141 U. S. 47.....	127
Kentucky, Douglas, 168 U. S. 488.....	15
Kiefer vs. Grand Trunk Ry. Co., 12 N. Y. App. Div. 28; Aff'd 153 N. Y. 688.....	84
 LaCompagnie Francaise des Cables Tele- graphiques, United States vs., 77 Fed. R. 495	125
Lake Shore & Mich. So. Ry. Co. v. Ohio, 165 U. S. 365.....	146
Lake Shore & M. S. Ry. Co. v. Smith, 173 U. S. 684	151
Latinette v. City of St. Louis, 201 Fed. R. 676	133, 140
Longacre Electric Light & Power Co., Matter of, 188 N. Y. 361.....	42
Long Sault Development Co. vs. Call, 242 U. S. 272	41
Long Sault Development Co., Matter of, 212 N. Y. 1.....	41
Looney v. Crane Co., 245 U. S. 178.....	151
Luxton v. North River Bridge Co., 153 U. S. 532	93, 139
 Mason City Co., Union Pac. Co. vs., 199 U. S. 160	21

Matter of Longaere Electric Light & Power Co., 188 N. Y. 361.....	42
Matter of Long Sault Development Co., 212 N. Y. 1.....	41
Mayor vs. Second Ave. R. R. Co., 32 N. Y. 272	43
Mayor, Suburban Rapir Transit Co. vs., 128 N. Y. 510.....	39
McDonald v. Hovey, 110 U. S. 619.....	22
McMullen, Ritchie vs., 159 U. S. 235.....	23
McNamee, Wilson vs., 102 U. S. 572.....	85
Memphis & Louisville Ry. Co. vs. Railroad Com'rs, 112 U. S. 609.....	42
Michigan, Detroit United Ry. vs., 242 U. S. 238	15, 46
Michigan Central R. R. Co. v. Vreeland, 227 U. S. 59.....	61
Minnensota Rate Cases, 230 U. S. 352.....	58, 104
Minnesota, Stearns vs., 179 U. S. 223.....	15
Mississippi River Power Co., Hagerla vs., 202 Fed. R. 776.....	98, 141
Missouri Pacific Ry. Co. vs. Nebraska, 217 U. S. 196	49, 56
Monongahela Bridge Co. vs. United States, 216 U. S. 177.....	96, 141
Monongahela Navigation Co. vs. United States, 148 U. S. 312.....	37, 141
Muhlker vs. Harlem R. R. Co., 197 U. S. 544..	91
National City, San Diego Land Co. vs., 174 U. S. 739	49, 56
Nebraska, Missouri Pacific Ry. Co. vs., 217 U. S. 196	49, 56
New Orleans & N. W. R. R. Co. vs. Harris, 247 U. S. 367	83

New York, Erie R. R. Co. vs., 223 U. S. 671..	78
New York, Henderson vs., 92 U. S. 259.....	132
New York Central R. R. Co. vs. Hudson Coun- ty, 227 U. S. 248.....	100
New York Central R. R. Co. vs. Tonsellito, 244 U. S. 360.....	82
New York Central R. R. Co. v. Winfield, 244 U. S. 147.....	81
Nishimura Ekin vs. United States, 142 U. S. 651	116
Northern Pacific Ry. v. Duluth, 208 U. S. 583	15
Northern Pacific Ry. vs. Washington, 222 U. S. 370	80
North River Bridge Co., Luxton vs., 153 U. S. 532	93, 139
O'Brien, People vs., 111 N. Y. 1.....	38
Oceanic Navigation Co. vs. Stranahan, 214 U. S. 320	117
Ogden, Gibbons vs., 9 Wheaton, 207.....	85, 109
Ohio, Lake Shore & M. S. Ry. vs., 165 U. S. 365	146
Owensboro vs. Cumberland Telephone Co., 230 U. S. 58.....	42
Passenger Cases, 7 Howard, 283.....	127
Patton Paper Co., Green Bay Co. vs., 172 U. S. 58	71
Pennsylvania, Gloucester Ferry Co. vs., 114 U. S. 196	100
Pennsylvania, Commonwealth of, Prigg vs., 16 Peters 539	75
Pennsylvania vs. Wheeling & Belmont Bridge Co., 18 Howard 421.....	89, 112, 133

Pennsylvania R. R. Co. vs. Baltimore & N. Y.	
R. R. Co., 37 Fed. R. 129.....	139
People vs. Curtis, 50 N. Y. 321.....	126, 133
People vs. Hudson River C. R. R. Corp., 104	
N. Y. Misc. 19; Affirmed, 186 N. Y. App.	
Div. 602	91
People vs. International Bridge Co., 223 N. Y.	
137	17, 47, 138
People vs. O'Brien, 111 N. Y. 1.....	38
People ex rel Reynolds vs. Common Council,	
140 N. Y. 300.....	39
People ex rel Third Ave. Ry. Co. v. Public	
Service Com., 203 N. Y. 299.....	40
Philadelphia, Gilman vs., 3 Wallace 713..	112, 133
Philadelphia Co. vs. Stimson, 223 U. S. 605..	73, 141
Port Richmond Ferry Co. vs. Hudson County,	
234 U. S. 317.....	100
Prigg vs. Com. of Pennsylvania, 16 Peters 539	75
Public Service Com., People ex rel Third Ave.	
Ry. Co. vs., 203 N. Y. 299.....	40
Railroad Bridge Co., United States vs., 6. Mc-	
Lean 517	112
Railroad Com. of Indiana, Southern Ry. Co.	
vs., 236 U. S. 439.....	79
Railroad Comrs., Memphis & Louisville Ry.	
Co. vs., 112 U. S. 603.....	42
Railroad Comrs. vs. Schutte, 103 U. S. 119...	21
Railway Co. v. Hesterly, 228 U. S. 702.....	61
Rauscher, United States vs., 119 U. S. 407..	121, 133
Reid, Southern Ry. Co. vs., 222 U. S. 424.....	103
Rigsby, Texas & Pacific Ry. Co. vs., 241 U. S.	
33	80, 106
Rio Grande, United States vs., 174 U. S. 690..	141

Ritchie vs. McMullen, 159 U. S. 235.....	23
Rochester Turnpike Road Co. vs. Joel, 41 N.	
Y. App. Div. 43.....	42, 43
Russell vs. Sebastian, 233 U. S. 195.....	15, 45
 San Diego Land Co. vs. Jasper, 189 U. S. 439	
.....	49, 56
San Diego Land Co. v. National City, 174 U.	
S. 739	49, 56
Sault Ste. Marie v. International Transit Co.,	
234 U. S. 333.....	100
Schutte, Railroad Comrs. vs., 103 U. S. 119...	21
Seaboard Air Line Ry. v. Blackwell, 244 U. S.	
310	104
Seaboard Air Line Ry. vs. Florida, 208 U. S.	
26	58
Sebastian, Russell vs., 233 U. S. 195.....	15, 45
Second Ave. R. R. Co., Mayor vs., 32 N. Y. 272	43
Smith vs. Alabama, 124 U. S. 465.....	77
Smith, Lake Shore R. R. Co. vs., 173 U. S. 684.	151
Smyth vs. Ames, 169 U. S. 466.....	58
Southampton, Trustees of, vs. Jessup, 162 N.	
Y. 122	37, 43
South Bend, Grand Trunk & Western Ry. Co.	
vs., 227 U. S. 544.....	15, 44
South Buffalo Ry. Co., Ives vs., 201 N. Y. 271	37
Southern Pacific Co. vs. Jensen, 244 U. S. 205	83
Southern Ry. Co. v. Railroad Com. of Indiana,	
236 U. S. 439.....	79
Southern Ry. Co. vs. Reid, 222 U. S. 424....	103
Southern Ry. Co., United States vs., 222 U. S.	
20	106
State, Washington Bridge Co. vs., 18 Conn.	
84	44

St. Clair County vs. Interstate Transportation Co., 192 U. S. 454.....	101
St. Louis, City of Latinette vs., 201 Fed. R. 676	133, 140
St. Louis S. W. Ry. Co. v. Arkansas, 217 U. S. 136	103
Stearns v. Minnesota, 179 U. S. 223.....	15
Stimson, Philadelphia Co. vs., 223 U. S. 605..	73, 141
Stockton vs. Baltimore & N. Y. R. Co., 32 Fed. R. 9, App. dis. 140 U. S. 699.....	92, 139
Stranahan, Buttfield vs., 192 U. S. 470.....	117, 127
Stranahan, Oceanic Navigation Co. vs., 214 U. S. 320	117
Suburban Rapid Transit Co. v. Mayor, 128 N. Y. 510	39
Taylor, Elmendorf vs., 10 Wheaton, 152.....	22
Taylor v. Taylor, 232 U. S. 353.....	84
Tennessee, Virginia vs., 148 U. S. 503.....	124
Texas & Pacific Ry. Co. vs. Rigsby, 241 U. S. 33	80, 106
Tompkins, Chicago, M. & St. P. Ry. Co. vs., 176 U. S. 167.....	58
Tonsellito, New York Central R. R. Co. vs., 244 U. S. 360.....	82
Trustees of Southampton vs. Jessup, 162 N. Y. 122	37, 43
Turner vs. Williams, 194 U. S. 279.....	116
Union Bdge. Co. vs. United States, 204 U. S. 364	96, 141
Union Pacific Co. vs. Mason City Co., 199 U. S. 160	21

United States, Bridge Co. vs., 105 U. S. 470.	96, 139
United States v. Cress, 243 U. S. 316.	....70, 149
United States, Fong Yue Ting vs., 149 U. S. 698	.....121
United States v. Forty Three Gallons of Whiskey, 93 U. S. 188.	.....117
United States v. Houston & Texas Ry. Co., 234 U. S. 342.	.....106
United States v. La Compagnie Francaise des Cables Telegraphiques, 77 Fed. R. 495.	....125
United States, Monongahela Bridge Co. vs., 216 U. S. 177.	.....96, 141
United States, Monongahela Navigation Co. vs., 148 U. S. 312.	.....37, 141
United States, Nishimura Ekiu vs., 142 U. S. 651	.....116
United States vs. Railroad Bridge Co., 6 Mc- Lean, 517	.....112
United States v. Rauseher, 119 U. S. 407.	..121, 133
United States v. Rio Grande, 174 U. S. 690.	....141
United States vs. Southern Railway Co., 222 U. S. 20.	.....106
United States vs. Union Bridge Co., 204 U. S. 364	.....96, 141
United States vs. Utah Power & Light Co., 209 Fed. R. 554.	.....61
Utah Power & Light Co., United States vs., 209 Fed. R. 554.	.....61
Virginia v. Tennessee, 148 U. S. 503.	.....124
Vreeland, Michigan Central R. R. Co. vs., 227 U. S. 59.	.....62
Washington, Northern Pacific Ry. Co. vs., 222 U. S. 370.	.....86

TABLE OF CASES

xiii

Washington Bridge Co. v. State, 18 Conn.	84	44
Wharton, Atlantic Coast Line vs., 207 U. S.		
328		103
Wheeling & Belmont Bridge Co., Pennsylvania vs., 18 Howard	421.....	89, 112, 133
Wilcox vs. Consolidated Gas Co., 212 U. S.	19	
.....		41, 49
Williams, Turner vs., 194 U. S.	279.....	116
Wilson vs. McNamee, 102 U. S.	572.....	85
Winfield, Erie R. R. Co. vs., 244 U. S.	170....	82
Winfield, New York Central R. R. Co. vs., 244		
U. S.	147	81
Wisconsin vs. Duluth,	96 U. S.	379..... 61, 72



SUPREME COURT OF THE UNITED STATES

INTERNATIONAL BRIDGE COMPANY,

Plaintiff in Error,

AGAINST

PEOPLE OF THE STATE OF NEW YORK,

Defendant in Error.



BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT:

Writ of error to the Supreme Court of the State of New York to review a judgment entered in Albany County Clerk's office on the 23rd day of March, 1918, on remittitur from the Court of Appeals, affirming the judgment of affirmance entered in Albany County Clerk's office August 2nd, 1917, on an order of the Appellate Division, Third Department, affirming with costs a judgment of the Supreme Court entered in said Clerk's office November 20, 1916, in favor of plaintiff, People of the State of New York, and against defendant, International Bridge Company, for \$744.42 (R. pp. 204-208, also 215-216). The judgment of the trial court was entered upon the decision of Mr.

Justice Rudd, a jury trial being waived (R. pp. 68, 69). No opinion was written by the trial court, nor in the Appellate Division. The opinion of the Court of Appeals is printed at pp. 197-202 of the record and is reported at 223 N. Y. 137. The assignments of error attack the constitutionality of Chap. 666 of the New York Laws of 1915, in that the judgment rendered is for a penalty of \$50.00 per day for not complying with said statute, and building an addition to the International Bridge over the Niagara River between Buffalo and Canada, when defendant had already built said Bridge as authorized by Chap. 176, Acts of Congress for 1870, and the same had thereafter been approved of as built by Chap. 474, Acts of Congress for 1874, and by subsequent Acts of Congress, and Acts of the Secretary of War thereunder (R. pp. 211-213).

PLEADINGS:

The action was brought by the Attorney General of the State of New York to recover penalties aggregating \$500.00, accruing from January 1st to January 10, 1916, at the rate of \$50.00 per day, because of plaintiff in error's non-compliance with Chapter 666 of the New York Laws of 1915, purporting to amend its charter by requiring it to construct a roadway for vehicles, and a pathway for pedestrians, upon the draw across Black Rock Harbor of the bridge of the defendant across the Niagara River between Buffalo and the Dominion of Canada, so as to give a passageway over said draw between Squaw Island and the mainland of

New York State, said roadway and pathway to be completed and ready for use by January 1, 1916 (pp. 6 to 12).

The answer admits the facts set up in the complaint, alleges certain other facts which will be commented upon later, admits non-compliance with the statute, but denies that defendant became liable to penalties because of said non-compliance, and sets up three affirmative defenses:

(1) That the Statute is unconstitutional because it impairs the obligation of contracts, to wit: the franchises granted defendant by the Legislature of the State of New York, and by the Parliament of Canada, and imposes additional burdens upon defendant not imposed as conditions of said franchises when granted, and deprives defendant of its property without due process of law.

(2) That the Statute is unconstitutional because the tolls fixed thereby, for the use of said roadway and pathway, are so low and inadequate that the same will not yield defendant a fair return upon the investment it is required to make, and will be confiscatory, and because the act provides that no charge shall be made for the use of the roadway for empty wagons and automobile trucks used for commercial purposes, or for the drivers thereof.

(3) That the Statute is unconstitutional because it is an interference with the exclusive jurisdiction conferred upon and exercised by Congress in the premises under the Commerce Clause of the Constitution (pp. 12-25).

HISTORICAL STATEMENT:

The International Bridge Company was created by a special Act of the Legislature of the State of New York in 1857 (New York Laws of 1857, Chap. 753. Ex. 1, p. 70, fol. 271). In the same year a similar corporation of the same name was created by an act of the Dominion of Canada (Chapter 227, 20th Victoria, Ex. 2, p. 70, fol. 271-2). In 1869 an act was passed by the New York Legislature authorizing the consolidation of the New York corporation and the Canadian corporation into a single corporation, possessing all the rights, privileges and franchises and subject to all the disabilities and duties of each of such corporations (New York Laws 1869, Chap. 550, Sec. 6; Ex. 3; pp. 70 and 71, fols. 272, 273). A similar act was passed by the Canadian Parliament about the same time (Chapter 65, 32nd and 33rd Victoria, Ex. 4; p. 71, fol. 273), and the consolidation authorized by said acts was perfected shortly thereafter (Finding I, pp. 51, 52).

The original act of incorporation of the State of New York (Laws of 1857, Chap. 753) created a corporation (Sec. 1):

*** * * for the construction, maintaining and managing a bridge across the Niagara River from the City of Buffalo to some point near Fort Erie, Canada * * * said bridge to be constructed with two draws, one across the Black Rock Harbor and the other across the main channel of the River."

* * * * *

"Sec. 15. Said bridge may be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains."

"Sec. 16. Whenever the said bridge shall be complete for the passage of ordinary teams and carriages the said company may erect toll gates, fix rates of toll and make such erections * * * to guard the entrance on said bridge, but no greater toll than the following shall be charged, viz: For every foot passenger entering upon or passing over said bridge, twenty-five cents; for every horse and rider, fifty cents; for every horse and single carriage, sixty cents; * * * for each double carriage and two horses, one dollar * * * for sheep passing one and one-half cents per head; for swine, two cents each; for meat cattle, six cents per head; for each horse in droves or in cars twelve and one-half cents."

"Sec. 17. Whenever said bridge is so complete as to admit of the passage of railroad trains, the said company may erect such gates and fixtures * * * and may make such * * * rules and regulations * * * in relation to the use of such bridge * * * by railroad companies * * * and the compensation to be paid therefor as said directors may think proper but no distinction shall be made * * * in favor of or against any one or more railroad companies * * *."

The Canadian Charter (Caption 227, 20th Victoria) created a corporation:

"for constructing, maintaining, working and managing a bridge across the Niagara River from some point at or near the Village of Waterloo (known as Fort Erie) in the said Township of Bertie to the City of Buffalo."

* * * * *

"Sec. XIII. The said bridge shall be constructed so as not materially to obstruct the navigation of the Niagara River. The said bridge shall have two draws, one across Black Rock Harbor and the other across the main channel of the river, which said draws shall be of ample width to give free and unobstructed passage to all steamboats and other vessels navigating the said river * * *."

"Sec. XIV. The said bridge shall be as well for the passage of persons on foot and in carriages and otherwise as for the passage of railway trains and such railway companies as are hereinafter mentioned or referred to shall have and be entitled to the same and equal rights and privileges in the passage of the said bridge and in the use of the machinery and fixtures thereof, and of all the approaches thereto."

* * * * *

"Sec. XVI. Whenever the said bridge is so completed as to admit of the passage of railway trains, the said company may erect such gates and fixtures to guard the entrance of

such trains upon the bridge as the said directors may deem proper and may make such by-laws, rules and regulations not inconsistent with the provisions of this act in relation to the use of the said bridge, its machinery, appurtenances, and approaches by railway companies, their trains and carriages, as the directors may think proper, but no discrimination shall be made by the said directors in favor of or against any one or more railway companies in relation to the approaches or the passage of the said bridge or the use of its machinery."

Said act authorizing consolidation (New York Laws of 1869, Chapter 550), also provided among other things as follows:

"Sec. 11. The said new corporation shall have power from time to time to borrow such sums of money as may be necessary for constructing and completing its bridge and for the acquiring of the necessary real estate for the site thereof and approaches thereto; and to mortgage its corporate property and franchises to secure the payment of any debt which shall be contracted by such corporation for the purposes aforesaid." (Exhibit 3, pp. 70-1, fols. 272, 273.)

In 1870, and prior to the erection of the bridge, the Congress of the United States passed an act authorizing the construction of this bridge, which we here insert in full because of its importance in this litigation:

Act of Congress June 30, 1870.

Chap. CLXXVI. An Act to Authorize the Construction and Maintenance of a Bridge Across the Niagara River.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any bridge and its appurtenances which shall be constructed across the Niagara river, from the city of Buffalo, New York, to Canada, in pursuance of the provisions of an act of the legislature of the State of New York, entitled "An act to incorporate the International Bridge Company", passed April the seventeenth, one thousand eight hundred and fifty-seven, or of any act or acts of said legislature now in force, amending the same, shall be lawful structures, and shall be so held and taken, and are hereby authorized to be constructed and maintained as provided by said act and such amendments thereto, anything in any law or laws of the United States to the contrary notwithstanding; and such bridge shall be, and is hereby, declared to be an established post-road for the mails of the United States; but this act shall not be construed to authorize the construction of any bridge which shall not permit the free navigation of said river to substantially the same extent as would be enjoyed under the provisions of said act and the amendments thereto, heretofore enacted and now in force; Provided, nevertheless, that the location of any bridge, the construction of which is hereby authorized, shall be subject to the approval of the Secretary of War, but not to be located south of

Squaw island; *And provided further*, that such bridge shall have at least two draws of not less than one hundred and sixty feet in width, in the clear between the piers, which shall be located at the points best calculated to accomodate the commerce of said river; and the piers of said bridge shall be parallel to the current of said river.

Sec. 2. *And be it further enacted*, that the bridge herein named shall be subject, in its construction, to the supervision of the Secretary of War of the United States, to whom the plans and specifications, relative to its construction, shall be submitted for approval. And all railway companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage of the same, and in the use of the machinery and fixtures thereof and of all the approaches thereto, under and upon such terms and conditions as shall be prescribed by the district court of the United States for the northern district of New York, upon hearing the allegations and proofs of the parties, in case they shall not agree.

Sec. 3. *And be it further enacted*, that the right to alter or amend this act so as to prevent or remove all material obstructions to the navigation of the said river, by the construction of the said bridge, is hereby expressly reserved.

Approved, June 30, 1870.

(Exhibit 5, p. 71, fol. 274.)

The bridge was constructed thereafter between 1870 and 1874, as a railroad bridge exclusively,

without any provision for footpaths or roadways (Decision, Finding VI, pp. 55, 56).

After the completion of the bridge Congress passed the following Act:

"That the modification in the plans of the bridge authorized by the Act approved on the 30th day of June, 1870, as stated in the report of the Board of Engineers of the War Department, dated February 7th, 1871, are hereby approved and said bridge, as constructed, is hereby declared to be a lawful structure and an established post route for the mail of the United States." (Act of Congress, June 23, 1874, Chapter 475, Ex. 6, p. 71; Finding VII, p. 56.)

In 1915 the New York Legislature passed the following act:

CHAP. 666. Laws of 1915.

AN ACT to amend chapter seven hundred and fifty-three of the laws of eighteen hundred and fifty-seven, entitled "An act to incorporate the International Bridge Company", in relation to the construction of a roadway and pathway and tolls for using the same.

Became a law May 22, 1915, with the approval of the Governor.

Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter seven hundred and fifty-three of the laws of eighteen hundred and fifty-seven entitled "An act to incorporate the International Bridge Company", is hereby amended by adding thereto a new section after section fifteen, to be known as section fifteen-a, and to read as follows:

§ 15-a. A roadway for vehicles and a pathway for pedestrians shall be constructed upon the draw across Black Rock harbor giving a passageway over said draw between Squaw Island and the mainland of New York state, such roadway and footpath to be completed and ready for use by January first, nineteen hundred and sixteen, and in case of the failure of said corporation or its successor in interest so to complete the same on or before said date, said corporation or its successor in interest shall be liable to a penalty of fifty dollars per day for each day that it shall be in default. Such penalty may be sued for and collected by the attorney-general in any court of competent jurisdiction.

Upon the completion of said roadway and pathway, said company may erect toll gates and fix rates of toll for the use thereof, but no greater tolls than the following shall be charged for the use of the said roadway or pathway: for every foot passenger, three cents for each passenger one way or five cents for round trip; for every horse and rider, five cents; for every carriage, except as hereinafter expressly provided, with horse or

horses and occupants, ten cents; for every automobile, except as hereinafter expressly provided, and occupants, ten cents; for loaded wagons and loaded automobile trucks for commercial purposes, two cents for each ton of material carried, and no charge for empty wagons or automobile trucks used for commercial purposes, or for the drivers thereof.

§ 2. This act shall take effect immediately.
(Exhibit 29, p. 76, fol. 293.)

SPECIFICATION OF ERRORS:

1. The Court of Appeals erred in holding that the New York Act of 1915 does not impair the obligation of contracts, to wit: the franchises granted to the International Bridge Co. by the legislature of New York and the Parliament of Canada in the acts of its incorporation, and does not deprive plaintiff in error of its property without due process of law. (First Assignment of Error, p. 212.)

2. The Court of Appeals erred in holding that the provisions of the New York Act of 1915 in regard to tolls for the use of the roadway and pathway between the City of Buffalo and Squaw Island are not confiscatory, and do not deprive the Bridge Company of its property without due process of law. (Second Assignment of Error, p. 212.)

3. The Court of Appeals erred in holding that the assets of the Bridge Company, devoted wholly

to interstate and foreign commerce and furnishing an instrumentality therefor, and its earnings derived wholly from such commerce and furnishing an instrumentality therefor, might be considered in determining whether the tolls fixed by the New York Act of 1915, for intrastate commerce and for the use of an instrumentality for such commerce, were confiscatory. (Third Assignment of Error, p. 212.)

4. The Court of Appeals erred in holding that the New York Act of 1915 did not contravene the commerce clause of the Constitution and Acts of Congress passed thereunder, including both (a) acts specifically relating to the construction and operation of said bridge, and the improvement of Black Rock Harbor, and (b) the general act relating to bridges over navigable waters of the United States, to wit: Section 9 of the Rivers & Harbors Act of 1899 (Chap. 425 of the Acts of 1899). (Third Assignment of Error, p. 212; Sixth Assignment of Error, p. 213.)

5. The Court of Appeals erred in rendering decision against the right, title, privilege and immunity set up and claimed by the Bridge Company under said Acts of Congress and the treaty between the United States and Great Britain, concerning Boundary Waters between the United States and Canada, to maintain and operate its bridge as authorized, constructed and approved by Congress without interference from the Legislature of the State of New York. (Sixth Assignment of Error, p. 213; Seventh Assignment of Error, p. 213.)

6. The Court of Appeals erred in holding that the New York Act of 1915 did not contravene the treaty entered into by and between the United States and Great Britain concerning boundary waters between the United States and Canada, proclaimed May 13, 1910. (Fifth Assignment of Error, p. 213; Seventh Assignment of Error, p. 213.)

POINT I.

The Court of Appeals erred in holding that the Act of 1915 did not impair the obligation of contracts, to wit: the franchises granted to the International Bridge Company by the Legislature of New York and the Parliament of Canada in the acts of its incorporation, and did not deprive plaintiff in error of its property without due process of law.

This court will determine for itself the validity, nature and extent of the contracts between the plaintiff in error and the State of New York and Dominion of Canada, respectively.

"This court has always held that the competency of a state, through its legislation, to make an alleged contract, and the meaning and validity of such contract were matters which, in discharging its duty under the Federal Constitution it must determine for itself; and while the leaning is toward the interpretation placed by the State Court, such

leaning cannot relieve us from the duty of an independent judgment upon the question of contract or no contract."

Stearns v. Minnesota, 179 U. S. 223, 232, 233.

"The assignment of error on this ruling presents a question which this court is bound to decide for itself, independent of decisions of the state court. * * *

In every case like this, involving an inquiry as to whether a law is valid as an exertion of the police power, or void as impairing the obligation of a contract, the determination must depend on the nature of the contract and the right of government to make it."

Grand Trunk & Western Ry. v. South Bend, 227 U. S. 544.

Douglas v. Kentucky, 168 U. S. 488, 502.

Northern Pacific Ry. v. Duluth, 208 U. S. 583, 590.

Russell v. Sebastian, 233 U. S. 195, 202.

Detroit United Railway v. Michigan, 242 U. S. 238, 249.

How does Chap. 666 of the New York Laws of 1915 impair any contract obligation?

The New York Act of 1915 impairs the franchises of the International Bridge Company in three respects:

(A) It renders mandatory the building of a footway and roadway upon the International

Bridge which, under the original franchises conferred upon the Bridge Company by New York State and the Dominion of Canada, was not mandatory, but merely permissive and optional.

The New York Court of Appeals held in effect that the original New York Charter of 1857 did not require the Bridge Company to construct a way for carriages and pedestrians, and that the state could not impose additional burdens on a franchise once granted. The court said:

“1. The International Bridge Company, by the act of 1857, obtained from the state of New York the right to build a bridge over land in New York to the center of the Niagara river. It may well be doubted whether, in view of the language used in the act, the bridge company were obligated, if it built a bridge, to provide a way for carriages and pedestrians. The state, of course, in granting the charter, reserved to itself the right to amend it at any time, but this reservation did not authorize the state, the charter having been accepted and acted upon to the extent that it had ripened into property rights, to deprive defendant of the benefits thus obtained without compensation. (*Monongahela Navigation Co. v. United States*, 148 U. S. 312; *People v. O'Brien*, 111 N. Y. 1.) Nor could the state impair the value of the franchise by imposing additional burdens without paying for it. (*Trustees of Southampton v. Jessup*, 162 N. Y. 122.)” (R. p. 199.)

People of the State of New York v. International Bridge Co., 223 N. Y. 137, 143, 144.

But the state court held that the bridge was not built under the act of 1857, but under the act of 1869 (Chap. 550), providing for the consolidation of the New York and Canadian corporations. On this subject the court said:

"If it be assumed the act of 1857 did not impose an obligation upon the defendant to build ways for pedestrians and vehicles, the Canadian act certainly did. The language of that act was: 'Said bridge shall be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains.' When the two corporations, therefore, were consolidated, with their consent and the consent of the state of New York, the defendant became obligated to construct a bridge for railroad trains, foot passengers and vehicles. The charter thus given by the consolidating act was accepted subject to whatever duties were imposed upon either or both of the old corporations. The bridge, as we have seen, was built under the consolidating act, but provision was made only for railroad trains. It had by the acceptance of the charter obligated itself to build one also for pedestrians and vehicles. Compelling it to keep its implied agreement to do what the charter required does not impair the obligation of the contract or impose additional burdens."

The proper construction to be placed upon the Canadian act of incorporation, and upon the act of consolidation, thus becomes vital and decisive under the decision of the Court of Appeals. The New York court assumed to construe the Canadian act *de novo*, ignoring the construction which had already been placed upon it by the Canadian courts.

The highest court in the Province of Ontario has held that the Canadian charter, as well as the New York charter, is only permissive in this respect, and has refused to require the Bridge Company to construct a bridge for foot passengers and vehicles.

Attorney - General vs. International Bridge Co., 6 Ont. Appeal Reports, 537 (Ex. 9, introduced at p. 72; printed at pp. 180-187).

The learned Trial Court refused to find, as requested by defendant, that the Canadian Court held and determined that this provision was permissive, and not mandatory, and imposed upon the corporation no obligation to construct foot-paths or roadways across its bridge. (Defendant's Request to Find VIII; pp. 31-32.) To this defendant duly excepted (Defendant's Exception XIV, p. 48). The Court found instead that it was held and determined that the Attorney-General of the Province of Ontario was not the proper party plaintiff to maintain such an action; that the bridge did not constitute a nuisance, and that the Court did not have jurisdiction to grant the relief

demanded (Decision, Finding VIII, pp. 56, 57), to which defendant duly excepted (Defendant's Exception I, p. 47). It will be necessary, therefore, to consider this decision in some detail.

It is true that the question of the standing of the Attorney-General of Ontario was considered by the Court, and the Learned Judge, writing the opinion, said: "I am *disposed to think* the Attorney General of Ontario is not the proper party to file this information." But the decision was expressly placed upon the broader ground that it was not obligatory upon the company to build the footway and roadway, but that the statute was merely permissive, the Court saying:

"If the information had contained only such allegations as those upon which the decree is based, omitting all reference to the structure being a nuisance, and confining its prayer to the relief now granted, I apprehend it would have been demurrable, both on the ground that no contract with the public is shown, and because the Attorney-General for Ontario, who can represent only a limited portion of the public with whom, if at all, such a contract exists, has no *locus standi* on such application."

* * * * *

"But I am of opinion that no grounds have been shown for the interference of the Court. It is now perfectly well established, since the decision of the Exchequer Chamber in *Regina vs. York and North Midland R. W. Co.*, 1 E. & B., 858, that Acts of this description are

not to be regarded, as they had come to be regarded, as contracts; that they are what they profess to be and nothing more; they give conditional powers which if acted upon carry with them duties. Statutes may be so framed as to render it obligatory upon the companies to proceed with the works, but that is not so in the present case; the words of the Act are simply permissive; nor is there in my opinion, anything in the argument that although originally permissive it ceased to be so and became obligatory when once begun. Suppose the company had constructed the foot-way as to the least expensive portion of the work, and then finding the railway bridge too expensive had abandoned it, could it be contended with any force that the shareholders should, at a ruinous loss to themselves, proceed with its construction? Yet that must follow, if this argument be sound." * * *

"For these reasons I think this decree cannot be supported, for I assume the fact to be, not that a foot-way for passengers has been made, but that parties can manage to pass on foot by the side of the track, and that that portion of the bridge has not been completed any more than the carriageway in compliance with the Act of Parliament."

If any part of the Court's opinion was *obiter*, it was that portion relating to the status of the Attorney General of Ontario. At most, the case is one where there are two grounds, upon either

of which the judgment of the Court can be sustained, and in such case the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other.

Union Pacific Co. vs. Mason City Co., 199 U. S., 160, 166.

Railroad Companies vs. Schutte, 103 U. S., 119.

It is well settled that the construction placed upon a foreign act by the courts of its own jurisdiction is conclusive upon our courts and is in effect a part of the foreign law.

"This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on principles supposed to be universally recognized, that the judicial department of every government where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain or of France or of any other nation, had misunderstood their own statutes and, therefore, erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law and

feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute."

Marshall, C. J., in *Elmendorf v. Taylor*,
10 Wheaton, 152, 159.

So where the English statute of limitations was enacted here the English construction came with it.

McDonald v. Hovey, 110 U. S. 619, 628.

The same rule was applied by this court to parts of the interstate commerce act adopted from the English traffic act.

Interstate Commerce Commission v. Baltimore & Ohio Ry., 145 U. S. 263, 284.

The subject of foreign judgments is extensively discussed in *Hilton v. Guyot*, 155 U. S. 113, where a judgment of France was held *prima facie* binding.

The general rule is that judgments rendered in England, or Canada, or any other foreign jurisdiction, subject to the English common law, will be conceded conclusive effect in the United States, if not impeachable for fraud, lack of jurisdiction or like causes, since the principles of common law as now held recognize judgments based thereon as conclusive on the merits.

Wharton on Conflict of Laws, Vol. 2, Sec. 654-A, page 1409.

Thus a Canadian judgment is conclusive like that of one of our own states.

Ritchie v. McMullen, 159 U. S. 235.

The Bridge Company, after the passage of the Acts of Consolidation, and of the Act of Congress of 1870, constructed its bridge without any footpath or roadway, as a railroad bridge solely, and has operated it as such for more than forty years, with the full assent of the State of New York and Dominion of Canada.

The New York Legislature has recognized this structure as built and has acquiesced in the form of its construction. Twenty-four years after the bridge was completed as a railroad bridge solely, the charter of the Bridge Company was amended by Chap. 332 of the Laws of 1898, which empowered the Company to increase its capital stock and to borrow money "for the purpose of its incorporation" and to mortgage its property and franchises to secure the payment of such debts. Under the Act of Consolidation quoted above, the consolidated corporation was already empowered to mortgage its franchises to build its bridge. (Laws of 1869, Chap. 550, Sec. 11, Exhibit 3, pp. 70, 71.) Thus the Legislature expressly authorized the corporation to pledge as security for its debts the franchises now sought to be impaired.

By the Act of 1898, Sec. 16 of the Charter was amended so as to permit the Bridge Company to charge the tolls prescribed whenever the bridge should be completed for the passage of "cars or other vehicles", that section having previous-

ly provided that such tolls might be demanded when the bridge was completed for the passage of ordinary teams and carriages. This act was an acquiescence and assent by the Legislature, if such were needed, to the construction and maintenance of this bridge for railroad purposes solely.

(B) The New York Act of 1915 impairs the franchises of the Bridge Company by imposing upon it the additional burden of constructing and maintaining a highway bridge between the mainland of New York State and Squaw Island, in said state, all of the franchises conferred upon, and accepted and acted upon by the corporation, whether derived from the state, national or Canadian governments, having been limited to the construction and maintenance of a bridge between the City of Buffalo and Canada.

The learned Court of Appeals misapprehended the scope of the contention of the Bridge Company in regard to the alteration and impairment of its franchises, treating the Act of 1915 merely as a mandate that the company construct a footway and roadway, which, in its opinion, were already required by the New York Act of Consolidation of 1869 and ignoring entirely the Act of Congress in 1874 declaring the bridge a lawful structure as constructed, without footway or roadway.

Neither the New York Act of 1869, however, nor any other act prior to that of 1915, required the Bridge Company to construct, maintain or operate a foot and vehicle bridge between Buffalo and Squaw Island. Neither the acts of the New York

Legislature, nor of the Canadian Parliament, nor of Congress required or permitted the Bridge Company to construct and operate a bridge between Buffalo and Squaw Island, or to give access to its bridge from Squaw Island, or to build approaches to its bridge on Squaw Island, as required by necessary implication by the Act of 1915, which provides:

“A roadway * * * and a pathway * * shall be constructed upon the draw across Black Rock Harbor *giving a passage-way over said draw between Squaw Island and the mainland of New York State.*”

These were absolutely new burdens imposed upon franchises long ago vested in the Bridge Company, and are not to be justified by any reference to the Canadian Act or the New York Act of 1869, passed before the bridge was built, which acts if they required any highway on the bridge required one giving access to Canada, and not one giving access to Squaw Island.

The original charter granted by the State of New York provides for a corporation:

“For the construction, maintaining and managing a bridge across the Niagara River from the City of Buffalo to some point near Fort Erie in Canada, * * * said bridge to be constructed with two draws, one across Black Rock Harbor and the other across the main channel of the river.”

Chap. 753 of the Laws of 1857, Section 1
(Exhibit 1, p. 70).

The Canadian charter provided for the organization of a company:

"For constructing, maintaining, working and managing *a bridge across the Niagara River from some point at or near the Village of Waterloo (known as Fort Erie) * * * to the City of Buffalo * * **"

Caption 227—Twentieth Victoria (Exhibit 2, p. 70).

The act authorizing the consolidation of the Canadian and American companies provided that:

"It shall and may be lawful for said corporation to consolidate * * * with * * * any corporation now existing under the laws of the late Province of Canada * * * for the purpose of creating and maintaining *a bridge across the Niagara River at or near the Village of Fort Erie * * * to the City of Buffalo.*

Chap. 550, Laws of 1869, Section 3 (Exhibit 3, pp. 70, 71).

The power of the Bridge Company to borrow money and to mortgage its property and franchise as security therefor, is restricted to the "*purpose of its incorporation,*" by Section 11, Chapter 550 of the Laws of 1869, as amended by Chapter 332 of the Laws of 1898. Therefore, it would be impossible for the corporation to issue bonds secured by mortgage for the purpose of construct-

ing this roadway to Squaw Island, for this is not a "purpose of its incorporation."

The Act of Congress, passed in 1870, provided:

"That any bridge and its appurtenances, which shall be constructed *across the Niagara River from the City of Buffalo, New York, to Canada*, in the pursuance of the provisions of an act of the Legislature of the State of New York, entitled 'An Act to incorporate the International Bridge Company,' * * * shall be lawful structures and shall be so held and taken and are hereby authorized to be constructed and maintained as provided by said act and such amendments thereto, anything in any law or laws of the United States to the contrary notwithstanding,"

It is apparent from the above quotations from the various statutes of the State of New York, and the Dominion of Canada (as well as acts of Congress of the United States), that the International Bridge Company *has no franchise to construct, maintain or operate a bridge between Buffalo and Squaw Island*, and such an onerous and undesirable franchise cannot now be forced upon it without its consent. Its franchises are solely to construct and operate a bridge between the City of Buffalo and the Dominion of Canada. It was a mere coincidence that Squaw Island happened to lie across the course of the bridge. Because of this fact, the bridge was necessarily built across Squaw Island, originally on trestle work, which has since been filled in. The legal situa-

tion, however, is no different than it would be if the bridge had a single abutment or pier, resting upon the island. There has never been any access from the bridge to the island. The mere accident that owing to the physical situation, the bridge between Buffalo and Canada has been built in a somewhat unusual form, having one draw across the east branch of the river between the mainland of the City of Buffalo and Squaw Island, then a trestle now filled so as to present the appearance of a solid embankment across the island, and finally another draw across the main channel of the Niagara River, does not alter the legal status of the structure so as to permit the Legislature to treat the draw across Black Rock Harbor between Buffalo and Squaw Island as a separate bridge.

The Court of Appeals fell into obvious error in this respect, for it based its decision sustaining the New York act of 1915, requiring a foot and vehicle bridge from Buffalo to Squaw Island, upon the provision of the Canadian Act of 1857, that—“The said bridge shall be as well for the passage of persons on foot and in carriages and otherwise as for the passage of railway trains,” which it construed as mandatory, and which it held became obligatory upon the consolidated corporation under the New York Act of 1869. But the Dominion of Canada had jurisdiction only over that portion of the bridge within the limits of its territory, viz., that portion of the bridge west of the international boundary in the Niagara River, and wholly west of Squaw Island; while the New York Act

of 1915 operates on the portion of the bridge between Buffalo and Squaw Island, and east of the international boundary.

The provision in the Canadian Act, though unlimited in its terms, could and did only operate on that portion of the bridge within Canadian territory. This inherent limitation was as valid and binding as though the Canadian Act had expressly provided that it applied only to that portion of the bridge within the Dominion of Canada. Nor has the territorial operation of the Canadian Act of 1857 been extended by the New York Act of 1869, which merely authorized the consolidation of the New York and Canadian corporations into a single corporation, possessing all the rights, privileges and franchises, and subject to all the disabilities and duties of each of said corporations.

This the Canadian Court recognized when the matter was brought before it in 1881. The court said:

"But I think that independently of these considerations it is manifest that the jurisdiction of this court to grant relief cannot extend beyond the limits of the Province, and it being a fundamental principle of the law of mandamus, as well as of injunction, that it will never be granted in cases where if issued it would prove unavailable, there could be no object in giving the public the right to pass over the bridge as far only as Squaw Island; and if for no other reason this court should not interfere."

(Exhibit 9, page 186.)

Whether the provision of the Canadian act, that the bridge shall be as well for the passage of persons on foot and in carriages as for the passage of trains, be deemed to confer a right and privilege, or to impose a disability and duty, such provision, being a creation of Canadian law, deriving its vitality solely therefrom, and extending only to that portion of the bridge within Canadian territory, the New York Legislature, in adopting it and imposing it upon the consolidated corporation, *adopted it as it then existed, as a provision confined to the Canadian portion of the bridge.* The New York Legislature could not impose on the consolidated corporation the duty of constructing and operating a footway and roadway on the portion of the bridge within New York State, by merely adopting a Canadian statute requiring the corporation to construct and maintain such a footway and roadway on the portion of the bridge within the Dominion of Canada. That would go beyond making the consolidated corporation "subject to all the disabilities and duties of each of such corporations" (N. Y. Laws 1869, Chap. 550, Sec. 6), and would impose a new disability and duty to which neither of such corporations were subject.

Where two railroad companies, created under the laws of Delaware and Maryland respectively, were thereafter consolidated by statutes of each state, providing in substance that the new company should possess all the rights and privileges vested in the original companies, or either of them, this court said:

"The purpose of the two provisions was to vest in the new company the rights and privileges which the original companies had previously possessed under their separate charters; the rights and privileges in Maryland which the Maryland company had there enjoyed, and the rights and privileges in Delaware which the Delaware company had there enjoyed; *not to transfer to either State and enforce therein the legislation of the other.* The new company was clothed by the legislature of Delaware, so far as that legislature could clothe it, with all the rights and privileges of both the original companies; but as the Maryland company took under the legislation of Maryland only exemption from taxation of its shares in Maryland, the privilege of the new company in this matter could only be a similar exemption in that State, not a similar exemption of the shares of its capital stock from taxation in Delaware. The new company stood in each State as the original company had previously stood in that State, invested with the same rights, and subject to the same liabilities. And the act of consolidation, so far as Delaware was concerned, had only this effect."

The Delaware R. R. Tax, 18 Wallace, 206, 227, 228.

See also *Central R. R. & Banking Co. v. Georgia*, 92 U. S. 675, 676,
Chicago & N. Y. Ry. Co. v. Auditor General, 53 Mich., 79, 91, 92 (Opinion by Judge Cooley).

The Court of Appeals admits that the New York Act of 1915 cannot be sustained if it be regarded as imposing a new burden on the franchise granted to the Bridge Company, but only if it be construed as enforcing an obligation willingly assumed by the corporation at the time of the consolidation. But it is clear that it does impose a new burden on the franchise, for the Act of 1915 operates exclusively on the portion of the bridge east of the international boundary line and within the territory of New York, which was not affected by the requirements of the Canadian statute operating solely on the portion of the bridge west of that line.

(C) *The New York Act of 1915 impairs the franchises of the Bridge Company by drastically reducing the tolls authorized by the New York and Canadian Acts of Incorporation.*

The maximum tolls which the Bridge Company might charge were fixed by the New York Act incorporating the Company (N. Y. Laws 1857, Chap. 753, See. 16, Exhibit 1, p. 70).

The Canadian act did not specify the maximum tolls to be charged, but apparently vested power to fix the tolls in the Board of Directors by the following provisions:

“IX. The said board of directors shall have and be invested with full power and authority to conduct, manage and oversee and transact all and singular the concerns, affairs and business of the said corporation, and all matters and things whatever in any

wise relating to or concerning the same, and, amongst other things * * * ”

“Seventhly. To make the necessary by-laws in reference to the powers and duties imposed and conferred upon the said board by this act, and generally for the government and management of the said corporation, subject always to the provisions of this act and of the laws of this Province; with power to the said board to vary, alter, repeal or revive any of the said by-laws * * *.”

(Chap. 227, 20th Vic., Sec. 9, Exhibit 2, p. 70.)

The maximum tolls thus authorized by the New York and Canadian Acts of Incorporation were continued by the acts passed in 1869 permitting the consolidation of the two corporations “into a single corporation possessing all the rights, privileges and franchises, and subject to all the disabilities and duties of each of such corporations”. (N. Y. Laws 1869, Chap. 550, Sec. 6, Exhibit 3, pp. 70 and 71; Chap. 65, 32nd and 33rd Vic., Exhibit 4, p. 71.) The provisions of the Acts of the New York Legislature relating to tolls were adopted by Congress, which authorized the bridge “to be constructed and maintained as provided by said act (to wit: Chap. 753 N. Y. Laws 1857) and * * * amendments thereto”. Congress further enacted that all railway companies should have equal rights and privileges in the passage of the bridge and in the use of the machinery and fixtures thereof, upon such terms

and conditions as should be prescribed by the District Court of the United States for the Northern District of New York in case of disagreement between the parties. (Act of Congress of 1870, Chap. 176, Exhibit 5, page 71.)

The District Court, in a suit brought under this provision, held that Congress had left the power to fix railroad tolls where the acts of incorporation placed it, in the directors of the corporations, and that the jurisdiction conferred upon the District Court was confined to enforcing equality of use as between railroads.

Canada Southern Ry. Co. v. International Bridge Co., 8 Fed. Reporter, 190.

For the convenience of the court we will place the tolls authorized by the acts of incorporation, and adopted and approved by Congress, in parallel columns with the tolls fixed by the New York Act of 1915:

*Tolls authorized by Acts
of Incorporation and
Adopted by Congress.* *Tolls fixed by New York
Laws of 1915,
Chapter 666.*

For foot passengers 25c	For foot passengers, one way 3c
	For foot passengers, round trip..... 5c
For horse and rider 50c	For horse and rider. 5c
For horse and sin- gle carriage..... 60c	For carriage and oc- cupants 10c
For 2 horses and double carriage \$1.00	For automobile and occupants 10c
	For loaded wagons and automobile trucks for commer- cial purposes, 2c per ton of material carried.
	For empty wagons and automobile trucks for commer- cial purposes, and drivers thereof... Nothing

When the tolls in the left-hand column were fixed in 1857, and when they were continued by the New York Legislature in 1869 and adopted by Congress in 1870, the cost of labor and material was but a small fraction of what it is today.

It will be remembered that the Court of Appeals sustained this act against the contention of the Bridge Company that it impaired its franchises, on the sole ground that the act merely enforced the pre-existing duty and obligation of the corporation under the Canadian act of incorporation and the New York Act of 1869 to construct and maintain a footway and roadway upon its structure (Record, pp. 199-200). If such obligation rested upon the Bridge Company (which we deny), it was inextricably involved with the franchise of the corporation to charge the tolls allowed by the New York and Canadian acts of incorporation and the acts of consolidation. Moreover, Congress having approved and adopted these tolls across this international structure, it was thereafter beyond the power of the State of New York to alter and reduce them.

Covington Bridge Co. v. Kentucky, 154 U. S. 204.

The only possible answer to this contention is that the Act of 1915 does not conflict with the tolls fixed in the acts of incorporation and adopted by Congress, because it covers an entirely distinct field, not covered by those acts, *i. e.*, the construction and operation of a highway bridge between Buffalo and Squaw Island, within the State of New York, and the tolls to be charged across such intrastate highway bridge. But this contention involves the admission that a new duty and obligation is imposed on the Bridge Company by the Act of 1915, impairing its franchises, and that a new

burden is placed upon the international and interstate commerce for which the bridge was created, by compelling the Bridge Company to incur expense to provide facilities for purely intrastate traffic. We leave it to our opponents to decide which horn of this dilemma they prefer.

The New York Act of 1915 impairs the property rights of the Bridge Company vested under previous legislation. Doubtless the general franchises of the Bridge Company, such as the franchises to be a corporation, issue stock, borrow money, adopt by-laws, etc., are subject to modification by the Legislature under its reserved power, but the special franchise to construct, maintain and operate a bridge across the Niagara River, whether derived from the State of New York or from Congress, being once granted became a contract which could not be impaired by subsequent legislation, and a vested property right entitled to all the protection conferred upon private property of any sort, by the State and Federal constitutions.

Monongahela Navigation Co. vs. United States, 148 U. S. 312.

Trustees of Southampton vs. Jessup, 162 N. Y., 122, at 126.

Ives vs. South Buffalo Railway Co., 201 N. Y., 271, 318.

The reserved power to alter, suspend or repeal corporate charters does not extend to revoking or impairing special franchises acquired by a corporation. This is true, though such franchises be embodied in a special act of incorporation.

A leading case on this subject is *People vs. O'Brien* (111 N. Y., 1). In that case a street railway company was incorporated in 1884, and by its charter was empowered to mortgage its franchises, which it subsequently did to secure bonds issued by it. In the year of its incorporation the City of New York granted to the company a franchise for a street railway in Broadway and the company constructed its road. Rumors of corruption in connection with the granting of this franchise were rife, and culminated in the passage of an act by the Legislature, in 1886, dissolving the corporation, and assuming to transfer its franchises to others. The New York Court of Appeals said, per Ruger, J.:

"When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country; the numerous laws adopted in the several states providing for their security and enjoyment, and the extent of litigation conducted in the various courts, state and federal, in which they have been upheld and enforced, there is no question, but that in the view of legislatures, courts and the public at large, certain corporate franchises have been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term."

* * * * *

"The power to repeal the charter of a corporation cannot, upon any legal principle, in-

clude the power to repeal what is in its nature irrepealable, or to undo what has been lawfully done under power lawfully conferred.

(*Butler vs. Palmer*, 1 Hill, 335)."

* * * * *

"An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly, would be equally ineffectual and void."

This decision has been steadily and consistently followed by the State and Federal courts.

Suburban R. T. Co. vs. Mayor, 128 N. Y.
510, 520.

Coney Island R. R. Co. vs. Kennedy, 15
N. Y. App. Div. 588.

"No property right acquired under a state statute can be divested by repeal."

*People ex rel. Reynolds vs. Common
Council*, 140 N. Y., 300, 307.

The Court of Appeals, speaking of *People vs. O'Brien*, said:

"The only proposition there decided was that the reservation of the power to alter or repeal the charter of a corporation did not

reserve the powers to revoke or recall franchises given to it to construct a railroad."

City of New York vs. Bryan, 196 N. Y., 165.

Speaking of the effect of the New York Public Service Commissions Law, requiring the consent of the Commission to the exercise of a railroad franchise, and forbidding the assignment or transfer of such a franchise unless the transfer was approved by the Commission, the Court of Appeals said:

"The franchise of the Third Avenue Railroad Company was property and could not be destroyed. (*People vs. O'Brien*, 111 N. Y., 1). * * * Therefore, no consent could be made a prerequisite to either the transfer or enjoyment of the franchises."

People ex. rel. T. A. Ry. Co. vs. Public Service Com., 203 N. Y., 299, 308.

In another case the Court of Appeals said:

"The first obstacle that confronts the appellants in this case is the repeal of the statute under which the petitioning corporation was organized and by which its franchises were acquired. * * * The repeal, however, could not operate to confiscate any valid franchise or property right which the Long Sault Development Company had previously acquired under the act repealed (*People vs. O'Brien*, 111 N. Y., 1)."

Matter of Long Sault Development Company, 212 N. Y., 1, 8.

This case was appealed to this Court, and the appeal dismissed upon the ground that no federal question was involved, the decision in the Court of Appeals having been based upon the ground that the Act of 1907 conferring the franchises exceeded the powers of the legislature under the state constitution. This Court said:

"The grants of the Act of 1907 are such that if it was a valid law upon their being accepted they constituted property or contract rights of which the plaintiff could not be deprived and which could not be impaired by subsequent legislation * * *."

Long Sault Development Company vs. Call, 242 U. S., 272, 276.

"It cannot be disputed that franchises of this nature are property and cannot be taken or used by others without compensation. *Monongahela Co. vs. United States*, 148 U. S., 312; *People vs. O'Brien*, 111 N. Y., 1, and cases cited."

Willcox vs. Consolidated Gas Company, 212 U. S., 19, 44.

Where a Telephone Company was granted a franchise to use the streets for purposes of its wires, etc., by an ordinance containing a reservation of the right to alter and amend, this Court

held that this was merely a reservation of police control and did not reserve the right to revoke or repeal the ordinance.

Owensboro vs. Cumberland Telephone Co., 230 U. S., 58, 66 and 72.

The International Bridge Company's franchise to build, maintain and operate a bridge between Buffalo and Canada is wholly distinct from its franchise to be a corporation. This special franchise may be sold or mortgaged and may be exercised by an individual transferee.

Memphis & Louisville Ry. Co. vs. Railroad Commissioners, 112 U. S., 609, 616.
Matter of Longacre Electric Light & Power Co., 188 N. Y., 361, 368.

The purchasers of the Bridge Company's bonds had the right to rely upon the inviolability of its franchise, which alone gave value to its tangible property. Such a franchise is irrevocable as distinguished from the franchise of corporate existence, which is subject to alteration or repeal by the Legislature. Such a franchise survives the dissolution of a corporation or the repeal of its charter, and vests finally in the stockholders, in the same manner as the tangible property of the Company.

A substantial alteration of a franchise, by which it is impaired, or additional burdens are imposed upon it, is forbidden as much as its total destruction or repeal. Such a case was *Rochester Turn-*

pike Road Co. vs. Joel (41 N. Y. App. Div., 43), where an amendment to the charter depriving the company of its right to exact tolls for bicycles, was held unconstitutional, although its franchise, in other respects, was not affected.

Where a Town Board granted a franchise to make a roadway and erect a bridge over lands under water, it was held that the grantee had a right to construct a roadway of the usual sort, of earth and stone, and could not thereafter be compelled to construct a roadway upon an open trestle, nor could the franchise be revoked because of his refusal to do so.

Trustees of Southampton vs. Jessup, 162 N. Y., 122.

Where the City of New York attempted to impose a license fee on street cars after granting a franchise for their operation, the Court of Appeals said:

"Assuming that the Common Council had power to make the grant, then its acceptance by Pearsall and his associates, signified by the execution of the agreement with the conditions annexed thereto and the duties and obligations resulting therefrom, invested the latter with the right of property in the franchise which the Common Council could not take away or *impair* by any subsequent act of its own."

Mayor, etc., vs. Second Avenue Railroad Company, 32 N. Y., 272.

A statute requiring a Company authorized to maintain a permanent bridge, to erect a drawbridge, has been held unconstitutional.

Washington Bridge Company vs. State,
18 Conn., 84.

A franchise to maintain a double-track railway through the streets of a city is impaired by the repeal of so much of the ordinance as related to double tracks, with the result of restricting the railway company to a single track for a portion of the authorized distance of its road on which the track had not yet been laid. The state court sustained this repeal as a proper exercise of the police power, but this Court held otherwise.

Grand Trunk Western Ry. v. South Bend,
227 U. S. 544.

A municipal ordinance requiring a private water company, having a franchise to lay pipes in the streets of the city, to pay a license fee to the municipality impairs its franchise.

Boise Water Co. v. Boise City, 230 U. S.
84.

Where a gas company had acquired the right under the Constitution of California to lay its pipes through the streets of a city, its franchise could not thereafter be impaired by a city ordinance making it unlawful to make any excavation in a street without written permission from the Board of Public Works, though such ordinance was passed pursuant to an amendment of the

State Constitution permitting the municipality to prescribe conditions and regulations under which gas service might be supplied to the inhabitants.

Russell v. Sebastian, 233 U. S. 195.

Suburban railroad companies acquired franchises from the local authorities outside of the City of Detroit which permitted them to charge a higher rate of fare than was fixed by the ordinances granting like franchises to street railroads in the city. These companies were afterwards consolidated with a street railroad company operating in the City of Detroit. Thereafter, by acts of the Legislature, the limits of the city were so extended that portions of the outlying railways were embraced therein. These acts provided that the territory annexed should be subject to all the laws of the state applicable to the city and to all the ordinances and regulations of the city. The city and state contended that the outlying lines, in so far as they had come within the city through its extension, came also within the fare restrictions of the city ordinances. This court held that the act of the Legislature could not impair the obligation of the existing contracts fixing the higher rates for the suburban lines. .

Detroit United Railway v. Michigan, 242 U. S. 238.

The statute in question is a substantial alteration and impairment of the original franchise in three particulars. First, it *compels* the construction of a roadway and pathway, which was left optional in the original charter and by all legisla-

tion affecting the bridge down to the present time; Second, it treats the Black Rock Harbor draw as a *separate bridge*, ignoring the fact that neither the original charters of the New York and Canadian corporations, nor any subsequent legislation has ever imposed upon this Company the duty to maintain a bridge between Buffalo and Squaw Island; Third, it reduces drastically the tolls authorized by the acts of incorporation and approved by Congress.

POINT II.

The Court of Appeals erred in holding that the tolls fixed by the New York Act of 1915 for the use of the roadway and pathway between Buffalo and Squaw Island are not confiscatory, and do not deprive the Bridge Company of its property without due process of law.

The New York Court of Appeals said:

"As to the contention that the act of 1915 is confiscatory and deprives defendant of its property without due process of law, but little need be said. The trial court found as a fact, and the finding has been unanimously affirmed by the Appellate Division, that 'the probable cost of constructing the roadway and foot-path required by chapter 666 of the Laws of 1915, is insignificant in comparison to the assets and annual net earnings of the defendant.' It also found, and this finding was also unanimously affirmed, that there is no evidence in the record showing that the

investment required by chapter 666 of the Laws of 1915 would not yield a reasonable return to the defendant. These findings, as it seems to me, are fatal to the appellant's claim. If the investment necessary for the construction of roadways would not enable defendant to earn a fair return upon its investment then it was incumbent upon it to establish that fact. (*Willcox v. Consolidated Gas Co.*, 212 U. S. 19; *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262.) The court cannot assume, in the absence of such proof, that the act is confiscatory or that it in any way interferes with rights possessed by defendant." (Record p. 202.)

People v. International Bridge Co., 223 N. Y., 137, 148, 149.

There were no findings made by the trial court, either as to the cost of constructing the footpath and roadway, the cost of operation, or the income available from it. The finding that "the probable cost of constructing the roadway and footpath required by Chap. 666 of the Laws of 1915 is insignificant in comparison to the assets and annual net earnings of the defendant" (pp. 64 and 65, fols. 248, 249) and the further finding that there is no evidence in the record that the investment required by the statute would not yield a reasonable return (p. 65, fols. 249, 250), are mere conclusions of law without any findings of fact to sustain them. *The court has not found what the required investment would be, what the cost of*

operation would be, or what the return would be, even approximately. It is also apparent that these findings are tainted with error, for the court necessarily refers to the assets of the defendant devoted to *interstate and foreign commerce, and its earnings derived therefrom, these being its only assets and earnings.*

We respectfully submit that the difficulty in this branch of the case lies not in lack of evidence, of which there was ample, but in the failure of the Trial Court to make appropriate findings of fact, due to the adoption of an erroneous theory of law.

We have shown under our previous point the drastic reduction made by the Act of 1915 in the tolls authorized by the acts of incorporation. Such reductions, ranging from 85% to 90% of the original tolls, at a period when prices of materials and labor have enormously increased, raise a fair presumption that the new tolls fixed by the Act of 1915 are confiscatory. As though to emphasize this fact, the Act of 1915 expressly provides that no charge shall be made for the use of the roadway for empty wagons or automobile trucks used for commercial purposes, or for the drivers thereof. The learned counsel for the State, recognizing the radical nature of this provision, ingeniously suggests that the toll fixed for loaded wagons and trucks is a toll for the round trip. This theory finds no support in the statute which says nothing about a round trip in this instance, though it does specify the toll for the round trip for foot passengers; nor is there any suggestion by the Court of Appeals that the act should be so interpreted.

The toll for loaded trucks and wagons is for one way, and if they return loaded, they pay another toll. Empty trucks and wagons and their drivers, on the other hand, can go back and forth all day without paying anything. An empty wagon or truck might go from Buffalo to Squaw Island in the morning, be used for "commercial purposes" all day on the Island, and return free at night. It might go back and forth during the day to get gasolene for the motor, feed for the horses, or for the convenience of the driver and still be exempt from tolls. If the construction project planned by the Squaw Island Companies should ever be actually undertaken, it is probable that the transportation of materials about the Island would be performed by trucks from Buffalo, which would cross empty in the morning and return empty at night. That this provision is confiscatory and void is too clear for extended argument.

Willcox vs. Consolidated Gas Co., 212 U. S., 19.

Missouri Pacific Ry. Co. vs. Nebraska, 217 U. S., 196.

San Diego Land Co. vs. National City, 174 U. S., 739, 757.

San Diego Land Co. vs. Jasper, 189 U. S., 439, 442.

The learned Trial Court refused to find as requested by defendant "that the cost of construction of a wing addition * * * adequate to sustain a suitable roadway 16 feet wide and a foot-way with proper approaches thereto, including the cost of the land necessary for such approaches,

would have been approximately \$44,000.00 on the 31st day of December, 1915, and on the 1st day of June, 1915, the cost would have been approximately \$200.00 less than on December 31st of said year" (Defendant's requests to find, XXVI, p. 40).

The evidence is that at the time of trial the cost of such a wing across the Black Rock Harbor span, and approaches, would be approximately \$44,778.92, and the annual, fixed charge for maintenance and operation would be approximately \$8,374.00, less a plain error in computation of \$1,400.00 which reduces this amount to \$6,974.00 (Testimony of H. R. Safford, Chief Engineer of defendant, pp. 82 and 86). On December 31, 1915, the cost of the wing would have been \$750 or \$800 less, owing to the increase in the price of steel since that time (p. 99). These estimates provide for a wing strong enough to sustain the weight of a trolley car. The present specifications of the New York Highway Commission for the loading of highway bridges provides for a steam roller of 18 tons, and the amount of steel which would be required on this arm to conform to that specification would be very little less than that required for a 50-ton trolley car, as provided in the above estimate (p. 174, fols. 695, 696). This evidence is undisputed, the estimate made by the State's witness being on the basis of a roadway 12 feet wide and a 4-foot sidewalk (p. 161, fol. 643), which the witness was compelled to confess would not allow the passage of two automobile trucks, either loaded or empty, without causing one truck to ex-

tend over the sidewalk and endanger pedestrians. The witness admitted that to make a reasonable allowance for accidents and blunders of drivers, the roadway ought to be 16 feet wide (p. 162, fols. 645-648); and it is quite evident that the estimate of this witness would not allow for a wing which would meet the requirements of the State Highway Commission of the State of New York, nor one that could be safely used for the purposes for which this wing is intended. Nor was anything allowed for the cost of the approaches.

It is undisputed that Squaw Island is at present an undeveloped strip of land, except for some boat houses on the shore line, although defendant's request to find to this effect was refused by the learned trial court, probably through misunderstanding (Defendant's Request XXII, p. 38, fol. 151; Exception to Refusal XV, p. 47, fol. 185).

The photographs (Exhibits 31-A to 47 inclusive) which will be presented to the Court upon the argument, show the situation clearly, having regard always to the fact that such buildings as appear upon these views, other than boathouses, are situated not on the Island but on the mainland, it being impossible to exclude them from the picture owing to the low level of the Island. The Island, with the exception of a strip 75 feet wide on the Black Rock Harbor side, running from the Bridge to the south end of the Island, and a corresponding strip on the north side of the bridge about 1,000 feet long, owned by the Federal government, and the right-of-way of the Bridge Company, is owned by the Squaw Island Development

Corporation or possibly by the Squaw Island Freight Terminal Company, Inc., the parties interested in these two corporations being the same (pp. 148, 158). These companies own about 100 acres of upland and 24 acres of land under water (p. 148). All the people on the Island are their tenants except a few squatters on the government lands (p. 148). The tenants pay \$1.00 a foot front per year (p. 127). There are from 100 to 125 boathouses on the Island, some for gasoline launches but most of them for rowboats, and the owners of the boathouses use the Island as a headquarters for boating, fishing and recreation. Thirty to forty of these boathouses are on the east side of the Island, south of the bridge (pp. 123, 124), *i. e.*, upon the government lands, hence they must be squatters. The north end of the Island is level ground, and is used for baseball and football (p. 124). Mr. Kellogg, who collects the rent for the owner, says there are not more than half a dozen families who live on the Island the year around (p. 149). There are no streets or roadways on the Island (p. 129). As many as 1,000 or 1,200 people have congregated on the Island for baseball games or outdoor sports, and a good many people go there to gather flowers (pp. 130, 131). There is free access to the Island over Ferry Street and the Ferry Street bridge and over the government lock in Black Rock Harbor, as well as over the ice in the winter time (pp. 124, 125, 126). It is entirely problematical how many of the people living on the Island, or attending picnics and baseball games, or gathering

flowers, would pay the bridge toll of 5 cents while such free access continued. Knowledge of human nature suggests that the figures given would be subject to a substantial diminution on this score. In short, the Island appears to be used much as vacant lots in the city are used, and it does not follow by any means that the persons making such use of it would pay even the very small tolls prescribed by the act. Nor does it follow that a public service corporation should invest thousands of dollars and be muled additional thousands every year to make the Island more accessible for such sporadic use, any more than a street railroad company should be compelled to build a line to a vacant field to provide for occasional picnics, ball games or botanizing parties.

The government improvement has interfered with access to the Island, and has cut down the number of tenants, cutting the rentals in two (pp. 126, 132, 151). But even now there are numerous means of free access to the Island (pp. 126, 127, 128).

Mr. Kellogg admitted that he would not ask for the construction of the wing addition for the accommodation of the tenants of the owner (p. 152).

Plans were introduced in evidence showing an extensive, projected development of the Island, including slips cut into the Island from the Black Rock Harbor side, giving access to spur tracks from a main line of tracks running along the river front of the Island and connecting with the tracks of the Grand Trunk Railway Company upon the bridge (Exhibit B). It also appeared that numer-

ous corporations had been organized for the development of the Island in various ways, all of these corporations being composed of the same individuals. All of this, however, is future and speculative, and there is no certainty that such projected development will be carried out.

The only actual, existing, commercial development on the Island consists of the removal of sand and gravel by the Squaw Island Sand & Gravel Corporation, which in the year beginning June, 1915, took out 66,000 yards or 100,000 tons of gravel (p. 139). Assuming that all of this traffic would be carried over the bridge by trucks, at the rate prescribed by the statute of 2 cents per ton, this business would bring in a revenue of \$2,000 per annum. If we assume that the passenger traffic would amount to 10,000 persons making the round trip, per annum, which is far in excess of what is justified by the evidence, this would add \$500.00 revenue, making a total revenue in sight of \$2,500.00 as against \$6,974.00 cost of maintenance and operation.

The defendant is required by the terms of this statute to contribute substantially \$4,500 per annum for the benefit of the business and tenants of the Squaw Island Development Co. or the Squaw Island Freight Terminal Co., Inc., which ever may be the present owner of the land.

This is on the assumption that all traffic available from the sand and gravel business would pass over the highway arm of the bridge; but experience teaches that where water and rail transportation are equally available, heavy freight,

such as gravel, almost invariably seeks the water route because of the lower rate. Especially would this be true where the gravel deposit is so situated as to be immediately accessible both to the Great Lakes and the Erie Canal. The result would undoubtedly be that the only traffic passing over the highway arm of the bridge would be the local business of the Gravel Company in the City of Buffalo. What proportion this is of its total output, as shown, we are not informed.

No more flagrant case of private legislation has ever been brought to our attention. The Island is owned by a single corporation; the only business upon the Island is carried on by a subsidiary corporation, organized by the same interests; the only other occupants of the Island are tenants of the owner, using the same (with the exception of some half dozen families who stay there the year around) for boating and fishing purposes during the summer. The legislation by which the Bridge Co. is required to make an investment of substantially \$44,000.00, and incur an annual charge of nearly \$7,000.00, is purely for the benefit of a small group of gentlemen who have incorporated themselves under many names. We submit that this is a clear case of taking private property for *private* use, in violation of the Constitution of the United States and of the State of New York.

There are constitutional limits to what can be required of public service corporations, even under the somewhat elastic police power. Requiring the expenditure of money, *takes property*, whatever may be the ultimate return for the outlay.

It is beyond the police power of a state to compel a public service corporation to furnish access, at its own expense, to a private business, unless it shall appear that the income presently available as the result of such expenditure, will furnish a fair return upon the investment.

Missouri Pacific Ry. vs. Nebraska, 217 U. S., 196.

San Diego Land & Town Co. vs. National City, 174 U. S., 739, 757.

San Diego Land & Town Co. vs. Jasper, 189 U. S., 442.

The income to be derived from the bridge through tolls is of the very essence of its franchise. No corporation will build a bridge if it may not be paid for its use a sufficient sum, not only to give it a reasonable return upon the capital originally invested, but also to provide for re-building and improving the structure as necessary from time to time. This bridge, constructed between 1870 and 1873, was necessarily re-built 24 years later, in 1899; and the Black Rock Harbor span, directly involved in this action, was entirely replaced for the third time by a much larger and more expensive structure, under command of the Secretary of War in 1906. These facts, common in the history of bridges carrying heavy traffic over much navigated waterways, must be considered in connection with the adequacy of the tolls fixed by statute.

POINT III.

The Court of Appeals erred in holding that the assets of the Bridge Company, devoted wholly to foreign and interstate commerce and furnishing an instrumentality therefor, and its earnings derived wholly from such commerce and furnishing an instrumentality therefor, might be considered in determining whether the tolls fixed by the New York Act of 1915, for intrastate commerce and the use of an instrumentality for such commerce, were confiscatory.

The trial court expressly found:

"That all of the commercee passing over the bridge of the defendant across the Niagara River between the City of Buffalo, N. Y., and the Dominion of Canada, is either interstate commerce or foreign commerce between the United States and foreign nations and said bridge is an instrumentality of such interstate and foreign commerce." (Decision XVIII Finding of Fact, pp. 61 and 62.)

The operation of a bridge for foreign and interstate commerce across the Niagara River is the sole business which the plaintiff in error conducts, or is authorized to conduct by the acts of its incorporation. It necessarily follows that all of its assets are devoted to this business, and all of its earnings are derived therefrom; yet these are the assets and earnings which the court considered when it found that the probable cost of constructing the roadway and footpath required by the Act of 1915 is insignificant in comparison to the assets

and annual net earnings of the defendant (pp. 62 and 63).

This was gross error.

The rates fixed by the statute must stand by themselves and cannot be justified upon the ground that the defendant is making money upon its interstate and foreign commerce. The rule first announced in *Smyth vs. Ames* (169 U. S., 466 at 541) was again stated by Mr. Justice Hughes in the *Minnesota Rate cases* (230 U. S., 352, at page 435), as follows:

"Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the State for intrastate transportation affords a fair return, must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. This was also ruled in the *Smyth* case. The reason, as there stated, is that the State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business."

See also *Chic., M. & St. P. Ry. Co. vs. Tompkins*, 176 U. S. 167.

Seaboard Air Line Ry. vs. Florida, 208 U. S. 26.

This being the rule, the evidence introduced by the learned Attorney-General over our objection and exception as to the present earnings of the Bridge Company, derived solely from foreign and interstate commerce (Exhibits M to R-1, pp. 178, 179, fols. 702-705), must be entirely disregarded as having no bearing upon the question of adequacy of the rates fixed by the statute.

The finding of the court that there is no evidence in the record showing that the investment required by the act of 1915 would not yield a reasonable return to the defendant, is plainly based upon this incompetent evidence, and upon the erroneous theory that such investment might be considered in connection with other assets of the corporation, and the return therefrom with its other earnings, as may be done in cases where it is not necessary to separate a specific item, because both interstate and intrastate commerce are not involved.

POINT IV.

The Court of Appeals erred in holding that the New York Act of 1915 did not contravene the commerce clause of the Constitution, and acts of Congress passed thereunder, including (a) acts specifically relating to the construction and operation of said bridge, and the improvement of Black Rock Harbor, and (b) the general act relating to bridges over navigable waters of the United States, to wit: Section 9 of the Rivers & Harbors Act of 1899 (Chap. 425 of the Acts of 1899).

The International Bridge is subject to the paramount jurisdiction of the United States in five aspects:

First: As a possible obstruction to navigable waters of the United States which form an international boundary.

Second: As an instrument of foreign and interstate commerce.

Third: As a connecting link between the United States and a foreign nation.

Fourth: The Black Rock Harbor span of the bridge is within exclusive federal jurisdiction for the additional reason that it is a structure over lands and waters of which the United States is the owner in fee.

Fifth: Congress has expressly conferred upon the Federal District Court final authority in regard to the use of the bridge by railroads.

In all of the above respects the federal control over the bridge is, in its very nature, not only paramount, but exclusive.

It has always been within the power of Congress to exercise exclusive control over bridges across the Niagara River, both as obstructions to navigation and as instruments of foreign commerce. Any power which the State of New York might have over the subject could only exist by reason of silence and inaction on the part of Congress. The power of the state, if it existed at all, was not inherent, but permissive, and ceased to exist the moment that Congress entered the field and exert-

ed its dominant and all-embracing authority in the matter.

Wisconsin v. Duluth, 96 U. S. 379, 387.

Chicago R. T. & P. Ry. Co. v. Hardwick Elevator Co., 226 U. S. 426, 435.

The exertion by Congress of a power which is granted in express terms must supersede all legislation over the same subject by the states.

U. S. vs. Utah Power & Light Co., 209 Fed. R. 554, 559.

Mich. Cent. R. R. Co. vs. Vreeland, 227 U. S. 59, 66.

Ry. Co. vs. Hesterly, 228 U. S. 702.

Gulf, Colorado & Santa Fe Co. vs. Heffley, 158 U. S. 98, 104.

The Federal Government has manifested its purpose to exercise exclusive control over this particular bridge by a long series of legislative enactments and administrative acts. Before the bridge was built an act of Congress was passed prescribing the conditions upon which it might be erected.

This first act, passed by Congress in 1870 (Chap. 176), provided in substance that any bridge and its appurtenances, which should be constructed in pursuance of the provisions of the acts of the New York Legislature should be lawful structures and that such bridge should be an established post route for the mails of the United States. But this act further provided that the

erection of the bridge should be subject to the approval of the Secretary of War; that it should have at least two draws of not less than 160 feet in width in the clear between the piers, and the piers should be parallel to the current of the river, and that the bridge should be subject in its construction to the supervision of the Secretary of War, to whom the plans and specifications should be submitted for approval. *These were all new provisions not found in the acts of the New York Legislature.* This act is notable in that it treats of the bridge not merely as a possible obstruction to navigation, *but also indicates the intention of Congress to regulate it as an instrument of interstate and foreign commerce.* Thus, after the provisions designed to prevent obstruction to navigation, the second section of the act provides as follows:

“And all railway companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage of the same and in the use of the machinery and fixtures thereof and of all the approaches thereto, *under and upon such terms and conditions as shall be prescribed by the District Court of the United States of the Northern District of New York upon hearing the allegations and proofs of the parties in case they shall not agree.*” (Exhibit 5, p. 71.)

Congress thus emphasized the international character of the bridge by expressly providing for federal jurisdiction of controversies as to its use.

The act shows clearly that Congress realized the vast importance of this Bridge as an instrument and pathway of foreign and interstate commerce leading from Buffalo to the Dominion of Canada, and providing a means of communication by the short route through Canada between the western states and the Atlantic seaboard. The above provision in the Act of Congress of 1870 was construed by the District Court of the Northern District of New York in an action brought by the Canada Southern Railway Company against International Bridge Company in the year 1881. It was there held that the provision quoted was designed to enforce equality of use as between the various railroads which might desire to pass over the bridge, and that it was not the intention of Congress to empower the Court to fix rates of toll. The discussion of the Act by the District Court is, however, illuminating. The Court said:

"It was an inherent condition to the complete enjoyment of the grant conferred by the State of New York and the Dominion of Canada upon the corporation, that Congress should sanction the undertaking proposed, as Congress was a necessary party to any compact which involved the cession of the sovereignty of the United States over that part of the Niagara River lying within the boundaries of the State of New York. The river is a public, navigable water, and under the power to regulate commerce Congress undoubtedly had the right to prohibit obstructions to its navigation; to declare any obstruction a pub-

lic nuisance; to declare what degree or description of obstruction should be a public nuisance; to direct the mode of proceeding in the courts of the United States to remove it; and to punish any one who might erect or maintain it. *Taney vs. Wheeling Bridge Co.*, 13 How., 579. The franchises granted by the State of New York and the Dominion of Canada were accepted by the bridge company, subject to the right of Congress to intervene whenever its power to regulate commerce should be invoked, and to determine what should be the character and extent of its intervention. *Gilman vs. Philadelphia*, 3 Wall., 725; *The Clinton Bridge*, 10 Wall., 454; *County of Mobile vs. Kimball*, 102 U. S., 691."

* * * * *

"In view of the fact that the bridge to be built was to be not only an erection which might interfere with commerce upon a public, navigable river, but was to be a highway of commerce between the eastern and western states which might seek the shorter route through Canada, it was reasonable to expect that the protection of that commerce would find recognition at the hands of Congress; and it was not to be expected that Congress would devolve the duty of that protection on any other than one of its own tribunals. Accordingly it was but reasonable that the act should require the bridge company to submit itself to the jurisdiction of a court of the United States, within whose territorial juris-

diction the bridge was to be, whenever controversies should arise concerning the rights of the railway companies, and involving the measure of protection declared by Congress."

Canada Southern Ry. Co. vs. International Bridge Co., 8 Fed. Reporter, 190.

After the completion of the bridge, and in the year 1874, a supplemental act of Congress was passed, expressly approving the modification in the plans and declaring the bridge as constructed a lawful structure. *This act is important, because it shows the distinct approval of Congress to the omission of the roadway and footpath mentioned in the Canadian and New York acts of incorporation.*

Act of June 23, 1874, Chap. 475 (Exhibit 6, p. 71; Decision, Findings VI and VII, pp. 55, 56).

Congress thus adopted certain provisions of the New York acts by incorporating them in the act passed by it in 1870, modified certain other provisions and wholly omitted still others, and in the act of 1874 *entirely dispensed with the requirements of the State Legislature relating to roadway and footway* (if it was a requirement and not, as we claim, a mere permission), thereby exercising its paramount and exclusive authority over the whole subject.

When the bridge was re-built in 1899, plans were approved by the Secretary of War, which provided

for a footpath and carriageway across the entire bridge from Buffalo to Canada (Exhibit 10), but did not provide for any access to Squaw Island. After the re-construction was commenced, however, it became apparent that the abutments of the bridge would not stand the weight of such a wing in addition to the heavier bridge required for railroad use. The footpath and carriageway were, therefore, dispensed with. This alteration in the plans was known to the United States engineer officer who supervised the reconstruction, and was by him brought pointedly to the attention of his superiors. In a letter dated September 9, 1901, he reported:

"That the bridge has been altered and the changes have been completed but not in accordance with the plans proposed by the company and approved by the Secretary of War. The plans as proposed and approved called for a widening of the bridge by building out on the sides, roadway and foot-walks, and the reconstruction of the draw rest pier and the consequent narrowing of the navigable channels at the draw bridge.

When the parties in authority undertook to do the work they came to the conclusion that the piers would not stand the additional widening proposed, and they, therefore, simply built a stronger and heavier bridge of about the same width as the old bridge and practically not increasing in any manner the obstruction of the bridge to the navigability of the river.

The bridge as reconstructed has a clearance of about two feet more than the old structure. The width over all is the same. The structure, as it now exists, has a single railway track, without carriage way or walk.

The work having been completed, I make this report and will, unless otherwise directed, drop this from my list of duties."

(Exhibit 11, p. 72.)

The War Department having had this alteration in the plans brought thus squarely to its attention, acquiesced in it, and raised no objection to the omission of the footpath and roadway.

(Decision, Finding X, pp. 57, 58.)

The improvement of Black Rock Harbor being already in contemplation at the time of this reconstruction, the Secretary of War inserted in his approval of the plans a paragraph as follows:

"That if the Secretary of War shall thereafter deem it necessary or advisable that the portion of the bridge over Black Rock Harbor shall be remodeled or changed in any manner, such change shall be made by the owners of the bridge or their assigns, at their own expense."

(Decision, Finding IX, p. 57.)

Thus the Secretary of War, at the time of this reconstruction in 1899, required the Bridge Company, as a condition to the approval of its plans, *to acknowledge the paramount jurisdiction of the*

War Department over the Black Rock Harbor draw.

Shortly afterwards the Black Rock Harbor improvement was undertaken by Congress, as appears by Exhibits 12 to 24 (pp. 72-75). It appears from these exhibits that Congress expended several million dollars on this improvement; that as a condition of undertaking the improvement, Congress insisted that the State of New York should cede to the United States of America the lands under the waters of Black Rock Harbor and the adjacent portion of the Erie Canal; that the Attorney General of the State of New York rendered an opinion, stating that he believed that this could be lawfully done (contained in Exhibit 14); that an act was passed by the Legislature authorizing such a conveyance (Chapter 373 of the New York Laws of 1904, Exhibit 16); that appropriate resolutions were passed by the Canal Board and Commissioners of the Land Office (Exhibits 15 and 18) and that such a conveyance was actually executed (Exhibit 19). This deed from the People of the State of New York to the United States of America, dated July 25, 1905, conveys:

"All the right, title and interest of the State of New York in and to the lands and structures in the City of Buffalo, County of Erie and State of New York, described as follows:

* * * * *

(b) The wall or partition between Black Rock Harbor and the Erie Canal from Station 49 and 50, as shown on map and filed with

papers in the application, to the foot of Amherst Street, including the uplands adjacent to the present ship-lock.

(c) *All the land under water of Black Rock Harbor from the foot of Maryland Street to and including the present ship-lock, including also the land owned by the State near the ship-lock and within the limits of the proposed improvement.*

(d) *The grant to the United States of the right to use the present Erie Canal, with a grant of land under its water from the New York Central Railroad bridge at the foot of Vermont Street, extended north to the Amherst Street crossing, and a grant of the land used a tow-path for the same distance.*

* * * * *

which lands are required by the United States in the construction of a ship canal from Lake Erie to the foot of Squaw Island in the City of Buffalo and the County of Erie.

To HAVE AND TO HOLD the said lands and structures unto said the United States of America so long as the United States constructs and maintains said ship canal."

(Decision, Findings XI, XII, pp. 59, 60.)

It was stipulated upon the trial that this deed includes the lands under the Black Rock Harbor span of the International Bridge (Record p. 74, fols. 286, 287).

The trial court expressly found that—"said lands and waters have ever since been under the exclusive jurisdiction of the United States, which has exercised undisputed authority over them, in connection with the improvement of Black Rock Harbor * * *".

(Decision, Finding XII, p. 60.)

It thus appears that the State of New York has surrendered to the United States of America every claim and right, which it might otherwise have had, in and to the waters and lands under water, crossed by the Black Rock Harbor span of the International Bridge; that such surrender was required by the federal government as a *condition* of proceeding with the improvement, and was consented to by the State of New York because of the great benefits which would accrue to the State from having the improvement carried out.

This canalized stream remained navigable water of the United States for all purposes of federal jurisdiction and regulation.

United States vs. Cress, 243 U. S. 316, 326.

And the legal effect and import of the conveyance of the State of New York were to place absolute ownership in the improvement and appurtenances in the United States, which proprietary rights thereby became added to the jurisdiction and control that the United States possessed over Black Rock Harbor as a navigable water.

Green Bay Co. vs. Patton Paper Co., 172
U. S., 58, 79.

In a leading case where Congress took under its protection and control an improvement started by private enterprise at Duluth, consisting of a canal across Minnesota Point, connecting the waters of Superior Bay with those of Lake Superior, and made appropriation for the maintenance and enlargement of the work, this Court discussed the general policy of the National Government in regard to the improvement of navigable waters as follows:

“It is to be observed, as preliminary to an examination of the acts of the general government in the special matter before us, that the whole system of river and lake and harbor improvements, whether on the seacoast or on the lakes or the great navigable rivers of the interior, has for years been mainly under the control of that government, and that whenever it has taken charge of the matter, its right to an exclusive control has not been denied.”

* * * * *

“We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States, and these acts of the Executive Department in carrying those statutes into effect, constitute an adoption of the canal and harbor improvement started by the City of Duluth, and a taking exclusive control of it. That they amount to

the declaration of the Federal government, that we here interpose and assert our power. We take upon ourselves the burden of this improvement, which properly belongs to us, and that hereafter this work for the public good is in our hands and subject to our control.

"If the merest recital of these acts of Congress, and of the War Department under them, do not establish that proposition, we can have little hope of making it plain by elaborate argument.

"Nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the government was organized under the Constitution. The only question ever raised has been how far and under what circumstances the exercise of the power is exclusive of its exercise by the States. And while this Court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation, *in the absence of any action of the general government in the same matter, the doctrine has been laid down with unvarying uniformity that when Congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under State authority.* The adjudged cases in this court on this point are numerous." (*Italics ours.*)

Wisconsin vs. Duluth, 96 U. S., 379.

Where the Secretary of War established new harbor lines and required the removal of wharves which were within the harbor lines established by the State and Federal authorities when erected, this Court held that the power of the States over navigable waters is subordinate to that of Congress, and the State can grant no right to the soil of the bed of navigable waters which is not subject to Federal regulation.

Philadelphia Co. vs. Stimson, 223 U. S., 605.

Greenleaf Lumber Co. vs. Garrison, 237 U. S., 251.

How much more must this be the case when the United States actually owns the bed of the river by conveyance from the state itself.

In connection with the Black Rock Harbor improvement, the Secretary of War, as indicated in the approval of the plans of 1899, required the reconstruction of the Black Rock Harbor span of the International Bridge (Exhibit 23, p. 25, Decision, Finding XIII, p. 60). This span of the bridge was accordingly reconstructed under the supervision of the Secretary of War. Plans were submitted by the Bridge Company and were approved by the Secretary of War (Exhibits 25 and 26). These plans showed dotted lines "Provision for future roadway" and contained a note as follows: "Roadway shown in dotted lines not to be put in at present but provision is made in the design of the bridge for their future construction." The plans made no provision for access

to Squaw Island, for the only roadway ever contemplated by anyone was a roadway straight across the bridge from Buffalo to Canada. The structure was completed without the roadway and has been accepted by the Secretary of War in the usual manner, since the passage of Chapter 666 of the Laws of 1915 (Exhibits 30 and 31, p. 76; Decision, Findings XIV and XV, pp. 61, 62).

Notwithstanding the approval by the Secretary of War of these plans and of the plans of 1899 showing a highway wing addition, it is more than doubtful whether the Bridge Company could have constructed such a highway wing without again obtaining the consent of Congress. The Bridge Company might have built a combined railroad and highway bridge under the Act of Congress of 1870; but after the bridge was completed as a railroad bridge only, and Congress passed the Act of 1874 approving the modification of plans, consisting of the omission of the highway wing, and declaring the bridge as constructed to be a lawful structure, the right of the Bridge Company to construct such a highway wing would seem to have been lost by abandonment of that part of its franchise with the approval of Congress. Nothing short of a new franchise from Congress could empower the Bridge Company to construct a highway wing upon this international bridge thereafter. The powers delegated by Congress to the Secretary of War extend only to the regulation of bridges as obstructions to navigation. The mere approval of plans by the Seeretary of War cannot confer, revive or enlarge a franchise.

Hubbard v. Fort, 188 Fed. R. 987.

In any event, the most that can be claimed is that Congress and the Secretary of War left it optional with the Bridge Company whether, and when, such roadway should be constructed. The question arises sharply whether the state can make mandatory that which Congress and the Secretary of War have left as optional. We are not without the guidance of authority on this point.

In an early case, this Court said:

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the State Legislatures have a right to interfere; and, as it were, by way of complement to the Legislation of Congress to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case *the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is, as the direct provisions made by it * * * the will of Congress upon the whole subject is as clearly established by what it had not declared as by what it has expressed.*" .(Italics ours.)

Prigg v. Commonwealth of Pennsylvania,
16 Peters, 539, 617.

In a case holding that an act of Louisiana forbidding discrimination by common carriers by land and water against persons of color, was a regulation of interstate commerce, and, therefore, unconstitutional, this Court said:

"Differences of opinion may exist as to the extent and operation of the national law regulating commerce among the several States, but none, it is presumed, will venture to deny that it is regulated very largely by congressional legislation. Admit that, and it follows that the legislation of Congress, if constitutional, must supersede all State legislation upon the same, and by necessary implication, prohibit it, except in cases where the legislation of Congress manifests an intention to leave some particular matter to be regulated by the several States. *Cooley v. Board of Wardens*, *supra*.

Decisive authority for that proposition is found in the unquestioned decisions of this Court. Such were the views of Judge Story more than thirty-five years ago. * * * *The Chusan*, 2 Story, 466; *Sinnot v. Davenport*, 22 How., 227."

Hall v. DeCuir, 95 U. S. 485.

"The regulation of commerce may consist in abstaining from prescribing positive rules for its conduct * * *. And when it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction,

free and unfettered by any positive regulations, such intention would be contravened by state laws operating as regulations of commerce, as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from the states."

Smith v. Alabama, 124 U. S. 465, 473.

In a recent case holding that a statute of South Carolina imposing a penalty on carriers for failure to settle or adjust claims within forty days was an unconstitutional burden on interstate commerce, in conflict with the Carmack Amendment, this Court said:

"It is suggested that the act is in aid of interstate commerce. The state law was not contrived in aid of the policy of Congress, but to enforce a state policy differently conceived and the fine of \$50 is enough to constitute a burden. *Southern Ry. v. Reid*, 222 U. S., 424-443. But that is immaterial. *When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a State law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.*" (*Italics ours.*)

Charleston & W. Car. Ry. Co. v. Varnville Furn. Co., 237 U. S. 597.

Where Congress enacted a law providing that certain classes of railroad employees should not work more than nine hours a day, and the New York Legislature enacted a law providing that the same employees should not work more than eight hours a day, the New York Court of Appeals upheld the State Act as supplemental to the Act of Congress, and not in conflict therewith. In reversing this decision, this Court said:

"We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. *It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.* * * *

The 'Hours of Service' law of March 4, 1907, is the judgment of Congress of the extent of the restriction necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety and of the cost and burden which the railroad must endure to secure it." (*Italics ours.*)

Erie R. R. Co. v. New York, 223 U. S., 671.

In one of the safety appliances cases this Court said:

"Under the Constitution, the nature of that power (to regulate commerce) is such that

when exercised it is exclusive, and *ipso facto*, supersedes existing state legislation on the same subject.

* * * * *

The test, however, is not whether the state legislation is in conflict with the details of the Federal Law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control.” (Italics ours.)

Southern Ry. Co. v. Railroad Com. of Indiana, 236 U. S. 439, 446, 448.

The Congressional Hours of Service Law, by its terms, did not go into effect until one year after its passage. The State of Washington had previously enacted a law upon the subject which was substantially identical with the act of Congress. This Court held that the State law became inoperative at once upon the enactment of the act of Congress, and before the latter had gone into effect. The Court said:

“It is elementary * * * that the right of a state to apply its police power for the purpose of regulating interstate commerce * * * exists only from the silence of Congress on the subject and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. * * * It results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such

manifestation that subject was at once removed from the sphere of the operation of the authority of the state."

Northern Pacific R. R. Co. vs. Washington, 222 U. S., 370.

Very recent cases in this Court again emphasize the rule that when Congress has exercised the powers reserved to it by the Constitution the situation permits of no divided empire, and state jurisdiction of the same subject matter is completely ousted.

Thus an employe of a railroad company has a right of action for damages resulting from violation of the Federal Safety Appliance Act, even though he was engaged at the time in intrastate commerce. This Court said:

"In the exercise of its plenary power to regulate commerce between the States, Congress has deemed it proper, for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. Congress having entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject-matter is excluded."

Texas & Pacific Ry. vs. Rigsby, 241 U. S.,
33.

In *N. Y. C. R. R. Co. v. Winfield*, 244 U. S., 147, it was held that the liabilities and obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce, are regulated both inclusively and exclusively by the Federal Employers' Liability Act, and Congress having thus fully covered the subject, no room exists for state regulation, even in respect of injuries occurring without fault, as to which the Federal Act provides no remedy. Hence, an award under the New York Workmen's Compensation Act for injuries not attributable to negligence could not be upheld. This Court said:

"It is settled that under the commerce clause of the Constitution, Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority."

* * * * *

"True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where,

the injury results from negligence imputable to it."

* * * * *

"Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both. And the reasons which operate to prevent the States from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it."

See also:

Erie Railroad Company v. Winfield, 244 U. S. 170.

In *N. Y. C. R. R. Co. v. Tonsellito* (244 U. S., 360), it was held that a father could not recover for loss of services and expenses resulting from the injury of his minor son while engaged in interstate commerce, in addition to the son's right of action, because the right of action provided by the Federal Employers' Liability Act was exclusive, and superseded all rights of recovery under the state law. This Court said:

"The Court of Errors and Appeals ruled, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the con-

trary view, we think, is clearly settled by our recent opinions in *New York Central R. R. Co. v. Winfield*, ante, 147, and *Erie Railroad v. Winfield*, ante, 170. * * * Congress having declared when, how far and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State."

In *New Orleans & Northwestern R. R. Co. v. Harris* (247 U. S. 367), it was held erroneous to apply the rule created by statute of Louisiana, that proof of injury inflicted by a locomotive should be *prima facie* evidence of negligence in actions against railroads, in an action brought under the Federal Employers' Liability Act. This Court said:

"In proceedings brought under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in Federal courts; and negligence is essential to recovery."

In *Southern Pacific Co. vs. Jensen*, 244 U. S., 205, it was held that a stevedore injured in unloading a ship at a port in New York State was not entitled to an award of compensation under the New York Workmen's Compensation Act, but must recover in admiralty, if at all. It was said that the New York Compensation Act was inconsistent with the poli-

cy of Congress manifested in acts limiting the liability of ship owners.

It is equally clear that the New York Act of 1915 is inconsistent with the policy of Congress manifested in the Acts of 1870 and 1874 regulating this bridge as an instrument of foreign and interstate commerce and expressly approving the omission of the highway feature after the completion of the structure.

This court has held that the Federal Employers' Liability Act superseded the New York Statute providing for the distribution of damages recovered by an administrator for decedent's death by negligence as unqueathed assets of his estate, and that the Federal Act was controlling in regard to the distribution of damages.

Taylor vs. Taylor, 232 U. S. 353.

The New York courts also recognize and apply the principle that a statute of one jurisdiction cannot be pieced out by that of another, for they have held in an action for damages for death by negligence brought in the state courts under a Canadian statute, that interest from the date of decedent's death could not be added to the recovery, in accordance with the New York law, there being no such provision in the Canadian statute.

Kiefer v. Grand Trunk Ry. Co., 12 A. D. 28; Aff'd 153 N. Y. 588.

The cases above cited amply sustain our contention that Congress, having steadily and consistently exerted its undoubted power over this

bridge as an instrument of foreign commerce, the whole subject is withdrawn from the control of the state, which cannot intervene with supplementary requirements and regulations for the benefit of local interests.

The Act of Congress of 1870 was not a mere confirmation of, or license to exercise the franchise granted by the State of New York as assumed by the Court of Appeals. Congress, by this act, assumed control of the whole subject-matter, regulating the bridge not merely as an obstruction to navigation, but also as an instrumentality of foreign and interstate commerce. The reference to the New York acts was merely for convenience, Congress adopting in general the provision of those acts as its own requirements, which thereafter derived their vitality from the act of Congress and not from the state legislation, just as state laws regulating pilots were long ago adopted by Congress and thereby rendered valid.

Gibbons vs. Ogden, 9 Wheaton 1, 207.
Wilson vs. McNamee, 102 U. S. 572, 574,
575.

That Congress acted independently, and that the franchise to bridge the Niagara River derived its life from the act of Congress and not from the acts of the New York Legislature, appears from the fact that Congress did not adopt the New York legislation *in toto*, but with important modifications, imposing new conditions concerning its use as an instrumentality of commerce, by subjecting it to the control of the United States District Court.

So in 1874, after the bridge was completed, Congress expressly approved the modification in the plans, *which consisted in the omission of the roadway and footway*, and declared the bridge as constructed to be a lawful structure, though constructed without such footway and roadway, which the New York Court of Appeals now holds to have been required by the New York Act of 1869.

Thus, though Congress by the Act of 1870 required the bridge to be built in accordance with the New York acts then in force, including the act of 1869 authorizing the consolidation of the New York and Canadian corporations, which, according to the decision of the New York Court of Appeals, imposed the duty of providing a footway and roadway on the bridge, nevertheless, in 1874, after the bridge was completed without any footway or roadway, and hence not in accordance with the acts of the New York Legislature as now construed by the Court of Appeals, Congress expressly approved this modification in the plans and declared the bridge, as constructed, to be a lawful structure. Congress thereby asserted and exercised, in the most unmistakable manner, its paramount authority *to determine the character of the structure, not only as an obstruction to navigation, but as an instrumentality of foreign and interstate commerce*, and in so doing, overruled the requirements of the New York statutes as now construed by the State Courts.

It was competent for Congress to decide that foreign and interstate commerce would be better served by a bridge devoted solely to railroad use

than by combining in one structure a railroad and a highway bridge. This bridge was created and authorized solely as an instrumentality of foreign and interstate traffic. It was to be a link in great interstate and international railroad systems. It was never contemplated, until 1915, that it should be used at all for intrastate commerce. Hence, the power of Congress over the form of the structure was plenary, and it must be concluded that Congress, in approving the change of plans, determined that a railroad bridge would serve more efficiently the enormous interstate and foreign traffic which was destined to pass over the bridge than a combined railroad and highway bridge; that the local demand for highway communication was a minor consideration, and should not be permitted to interfere with this vastly more important interstate and foreign commerce; just as in the *Wheeling Bridge* case, Congress determined that the commerce passing over the bridge was more important than the free navigation of the river, and that the latter must yield to the former.

The wisdom and foresight of Congress was fully justified by the fact that when the bridge was rebuilt, in 1899, the greatly increased traffic and weight of locomotives and cars necessitated a much heavier railroad bridge, and made it unsafe to add highway wings unless the foundations and abutments were rebuilt and enlarged, increasing the obstruction to navigation of the river.

BRIDGES OVER BOUNDARY WATERS:

The paramount and exclusive power of Congress in regard to the construction of bridges over

navigable waterways of the United States, which are boundaries between two states, is well established.

The principle was first asserted in the *Wheeling Bridge* case. It will be instructive to re-examine carefully the facts of that case. That bridge was constructed across the Ohio River under authority of an act of the Virginia Legislature. Subsequently the State of Pennsylvania brought an action in this court alleging that the bridge obstructed the free navigation of the River and a decree was entered that the bridge be elevated to a height designated, or abated. Thereupon, Congress passed an act declaring the bridge *to be a lawful structure in its then position and elevation*, anything in the laws of the United States to the contrary notwithstanding, expressly authorizing the company to maintain its bridge at such elevation and requiring vessels on the river to be navigated so as not to interfere with the bridge. Subsequently the bridge was blown down, and an injunction was procured prohibiting its reconstruction according to the original plan, the decree of this court being invoked to sustain the injunction. This court held that after the passage of the act of Congress declaring the bridge a lawful structure, even though it might be an obstruction in fact, it was not so any longer in contemplation of law; that Congress having exercised its paramount power in favor of the continuance of the bridge, no court could decree its removal. It was claimed that the act of Congress was in violation of the compact between Virginia and Kentucky at the

time of the admission of the latter into the Union, whereby it was agreed—"that the use and navigation of the River Ohio * * * shall be free and common to the citizens of the United States," which compact was assented to by Congress; but it was held that this compact could not operate as a restriction of the power of Congress, under the Constitution, to regulate commerce among the several states, otherwise it would amount to an alteration of the Constitution by Congress and the two states.

Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421.

The parallel here is exact. In the act of 1870 relating to this bridge, Congress assented to and largely adopted the terms of the existing state legislation. It did not and could not thereby estop itself from other and different action later, and in 1874, Congress, in the exercise of its undoubted power over foreign and interstate commerce, determined to override one of the requirements of the state legislation, (assuming for the purpose of argument that a highway on the bridge was such a requirement), and to approve and declare lawful a bridge constructed not in accordance therewith.

It is as useless to invoke the New York act of 1869, upon which the decision of the Court of Appeals is predicated, *after Congress has expressly approved and declared lawful a bridge not constructed in accordance with its terms*, as it was useless in the *Wheeling Bridge* case to invoke the decree of this Court, requiring the elevation or

abatement of the bridge, or the compact between Virginia and Kentucky, though approved by Congress, after Congress had passed a similar act declaring the bridge a lawful structure, and authorizing its maintenance in its then existing elevation.

The act of 1874, approving the change in the plans eliminating the footway and roadway originally contemplated, is vital and decisive in this case, but was entirely ignored by the New York Court of Appeals. This act was based upon a decision of this court.

The Act of 1874 approving the change in plans was drawn and passed about three years after this court had decided a case involving a similar act of Congress legalizing a bridge over the Mississippi River after it was built, and after a suit was begun to enjoin it as a nuisance. This court said of that act:

“We cannot doubt, upon a perusal of the section, but that it was the intention of Congress to legalize the bridge as then constructed across the river, and that the words used carry out fully this intent. It is declared ‘a lawful structure,’ that is, the bridge, as built, with its abutments, piers, superstructures, draw, and height, should have the sanction of law, and be maintained and used in that state and condition until the law was altered by the reserved power in the last section.”

The Clinton Bridge, 10 Wallace, 454, 462.

We see no distinction between that case and this case upon this point. The rule established in the *Wheeling & Belmont Bridge* case, and re-asserted in the *Clinton Bridge* case, was a rule of property on which plaintiff in error was entitled to rely.

Muhlker vs. Harlem R. R. Co., 197 U. S. 544.

Already the decision in the case at bar has proven embarrassing to the New York courts, and they have proceeded to distinguish it on the supposed ground *that it was a case where no authority to construct the bridge came from Congress*. (*People v. Hudson R. C. R. R. Corporation*, 104 N. Y. Misc. 19, pp. 34 and 35; *Affirmed*, 186 A. D., 602, 610). The lower courts have been misled on this point by the opinion of the New York Court of Appeals, which does not mention the Act of Congress of 1874, declaring the bridge, as constructed, a lawful structure, and which dismisses the Act of 1870 authorizing the construction of the bridge with the casual statement that—"The charter thus obtained by defendant (from the Acts of the New York Legislature) was confirmed by the Congress of the United States (Laws 1870, Chap. 176)."

In a case involving the building of a railway bridge across Arthur Kill, between the states of New York and New Jersey, it was held by Mr. Justice Bradley, afterwards of this court, that Congress could empower a corporation, organized under the laws of New Jersey, to build a bridge across the kill, which was a navigable waterway

of the United States and a boundary between New Jersey and New York, notwithstanding that the statutes of New Jersey expressly forbade the building of such a bridge without permission from the State Legislature, which had not been obtained, and although the State of New Jersey was the owner in trust for the people of the state, of the lands under water over which said bridge must pass. It was also held that Congress might confer like authority upon a corporation of New York State, which it might exercise without the consent and against the protest of the State of New Jersey. The court said:

"Still it is contended that although Congress may have power to construct roads and other means of communication between the states, yet, this can only be done with the concurrence and consent of the states in which the structures are made. If this is so, then the power of regulation in Congress is not supreme—it depends on the will of the states. We do not concur in this view. We think the power of Congress is supreme over the whole subject, unimpeded and unembarrassed by state lines or state laws; that in this matter, the country is one, and the work to be accomplished is national; and that state interests, state jealousies, and state prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no states."

Stockton v. Baltimore & N. Y. R. Co., 32
Fed. Rep. 9, 16. Appeal dismissed, 140
U. S. 699.

See also *Decker vs. Balt. & N. Y. R. R. Co.*, 30 Fed. R. 723.

The case of *Stockton vs. Ry. Co.* was cited with approval in *Luxton v. North River Bridge Co.* (153 U. S. 532) which upheld the power of Congress to create a corporation and empower it to build a bridge across the Hudson River between the states of New York and New Jersey. This court said in that case:

"From these premises the conclusion appears to be inevitable that although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by either of two states across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water."

A bridge company received a charter from the State of Kentucky to build a bridge across the Ohio River to Cincinnati, Ohio, the act of incorporation expressly requiring that it be confirmed by the State of Ohio, which was done by act of the Ohio Legislature; the Kentucky act, so confirmed by Ohio, authorized the directors to fix the rates of toll. Congress passed an act declaring the bridge, when completed in accordance with the

laws of Ohio and Kentucky, a lawful structure. Many years afterwards the Kentucky Legislature passed an act greatly reducing the rates fixed by the directors. This act was held void on the ground that the traffic across the river was interstate commerce, and the bridge was an instrument of, and the act of the Kentucky Legislature was an admitted regulation of such commerce, which the state had no power to make, Congress alone possessing the requisite power to enact a scale of charges in such a case.

Covington Bridge Co. v. Kentucky, 154 U. S. 204.

Four of the nine judges of this court taking part in the decision concurred in the result in the *Covington Bridge* case, on the ground that the states have power to establish and regulate bridges between two adjoining states, subject to the paramount authority of Congress over interstate commerce; that by the concurrent acts of Kentucky and Ohio, the Bridge Company was made a corporation in each state and authorized to fix rates of toll; that Congress having declared the bridge, when completed in accordance with the laws of Ohio and Kentucky, a lawful structure, and having made no provision for tolls, thereby manifested its intention that the tolls should be as established by the two states, and that the original acts of incorporation constituted a contract between the corporation and both states which could not be altered by one state without the consent of the other.

Either the majority or the minority reasoning in that case sustains the contention of the plaintiff in error in this case. Whether the jurisdiction of Congress over this international bridge is exclusive, so that the state could not regulate it even in the absence of action by Congress, or whether it was permissible for the state to exercise jurisdiction until its authority was superseded by action of Congress, the result will be the same, for here Congress has acted.

A State cannot, in the exercise of its police power, to prevent floods, order the removal of a bridge that is a necessary part of a line of interstate commerce. This Court said of such an attempt:

"They are out and out orders to remove bridges that are a necessary part of lines of commerce by rail among the States. But that subject-matter is under the exclusive control of Congress and is not one that it has left to the States until there shall be further action on its part. The freedom from interference on the part of the States is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ."

* * * * *

"The decisions also show that a State cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way."

Kansas Southern Ry. vs. Kaw Valley District, 233 U. S. 75.

Other cases where federal control of bridges crossing interstate boundary waters has been strongly asserted, are:

Union Bridge Co. v. United States (204 U. S. 364),

where the Secretary of War compelled the alteration of a bridge erected under state authority in order to accommodate the increased navigation of the river.

Monongahela Bridge Co. v. United States, 216 U. S. 177.

Bridge Company v. United States, 105 U. S. 470.

MISCELLANEOUS STRUCTURES IN BOUNDARY WATERS:

It has been held that state consent to the crossing of a navigable boundary stream between two states, with a pipe line laid under the bed of the stream conveying water to be used in interstate commerce, is not necessary if authority has been obtained from Congress.

Hubbard v. Fort, 188 Fed. Rep. 197.

Where Congress authorized the construction of a dam and lock in the Mississippi River, extending

from the Illinois to the Iowa shore, it was held that the power of Congress over the Mississippi was supreme, because its commerce was interstate and foreign. The court said:

"So that from any view, this river is peculiarly and solely under the power and control of the nation, and the nation can and does act only through Congress, acting either directly or by and through powers delegated. And it is for neither Iowa nor Illinois, and much less an individual, to in the slightest degree attempt to control navigation or commerce on this river. And Congress never has attempted to limit or burden navigation on the river, with but one exception, and that exception is in the interest of interstate commerce by land. When the first bridge across this river (Davenport and Rock Island) was provided for, the owners of steamboats combined to prevent its building, insisting that they had the monopoly of the free use of the river, and that the bridge piers, and draws would delay them, and add to the hazards. But that eminent equity judge and scholar in constitutional law, Judge Love, who so long presided in this court, adopted the argument and phrasing of Abraham Lincoln representing the railway company, and held that interstate commerce should be free 'across' as well as 'lengthwise' the river. And see *United States v. Railroad Bridge Co.*, 6 McLean, 517, Fed. Cas. No. 16, 114. And now we have near 20 bridges across this river, all built with the 'assent' or

'authority' of Congress, and all built under the supervision of the Secretary of War or other designated officer, but all built so as to place the lightest possible burden on the commerce of the river."

Hagerla v. Mississippi River Power Co.,
202 Fed. Rep. 776, 782.

BOUNDARY FERRIES:

The same principle has been applied to boundary ferries, and it has been held that a state may not tax the business of an interstate or international ferry, nor require such a ferry to take out a state or local license.

In a leading case, the State of Pennsylvania attempted to impose a tax on the capital stock of the Gloucester Ferry Co., which was incorporated in New Jersey and conducted a ferry across the Delaware River from Gloucester to Philadelphia. This court held that the business of the ferry was interstate commerce and was not subject to exactions by the State of Pennsylvania.

"Commerce among the States consists of intercourse and traffic between their citizens and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the con-

ditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. * * * And it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by State legislation."

* * * * *

"In *Gibbons v. Ogden*, Chief Justice Marshall said that laws respecting ferries, as well as inspection law, quarantine laws, health laws, and laws regulating the internal commerce of the States, are component parts of an immense mass of legislation, embracing everything within the limits of a State not surrendered to the general government; but in this language he plainly refers to ferries entirely within the State, and not to ferries transporting passengers and freight between the States, and a foreign country; for the power vested in Congress, he says, comprehends every species of commercial intercourse between the United States and foreign countries."

Gloucester Ferry Co. v. Pennsylvania,
114 U. S. 196, 203-204, 215-216.

A state cannot require an international ferry operated between Sault Sainte Marie, Michigan, and Sault Sainte Marie, Ontario, Canada, to take out a local license as a condition of carrying on its business, pursuant to an ordinance of Sault Sainte Marie, Michigan.

Sault Sainte Marie v. International Transit Co., 234 U. S. 333.

A state has power to establish boundary ferries (interstate), not a part of a continuous interstate carrier system, and regulate the rates to be charged from its shores, in the absence of action by Congress, but always subject to the paramount authority of Congress over commerce.

Port Richmond Ferry v. Hudson County,
234 U. S. 317.

But where Congress has taken control of ferries operated in connection with interstate railroads, the power of the state to regulate such ferries is destroyed. The assumption of power by Congress includes exclusive control of the conveyance of local passengers who are not railroad passengers, when all of such local passenger traffic is interstate.

N. Y. C. R. R. v. Hudson County, 227
U. S. 248.

This court has held that state legislation requiring a railroad ferry company, transporting railroad trains across an interstate river, to carry on a local ferry business across said river, is a direct burden on interstate commerce. In this case, a railroad ferry, which was a link in interstate transportation, was distinguished from a local ferry, and transportation of this character was held not to be ferriage, and not within the state power even where there had been no action by Congress.

St. Clair County v. Interstate Transportation Co., 192 U. S. 454, 468, 469, 470.

The same principle is clearly applicable to the requirements of the New York Act of 1915, that the International Bridge, created purely as a link in interstate and foreign commerce, and operated for more than 40 years as a railroad bridge exclusively under Congressional sanction, shall now construct and operate a local foot and vehicle bridge between Buffalo and Squaw Island in the State of New York.

The reasoning of these cases applies with much greater force to a bridge across an international stream, in which the interests of the nation as a whole must always be involved. Although the plaintiff in error was incorporated under statutes of New York State and the Dominion of Canada, and afterwards obtained the permission of these two sovereignties to consolidate the two corporations thus formed, it did not build its bridge under the authority of the State of New York, but pro-

cured express authority from Congress in the act of 1870, before it started the construction of its bridge, and afterwards procured the ratification by Congress of the alterations made in its construction. This case, therefore, presents precisely the same situation as *Stockton v. Baltimore, etc. R. R. Co.* (32 Fed. Rep. 9) above cited, except that here the state authorities acquiesced in the construction of the bridge under the act of Congress, while in the *Stockton* case the State of New Jersey violently objected and attempted to prevent the construction of the bridge, but the *Stockton* case expressly holds that the power of regulation in Congress does not depend on the will of the states. This being true, the acquiescence of New York State in the construction of this bridge under the authority of Congress was entirely immaterial, and did not confer upon the state any right to regulate the bridge thereafter.

If Congress may authorize a New Jersey corporation to erect a bridge over an interstate stream, against the express prohibition of a New Jersey statute, although the State of New Jersey is the owner of the lands under water, surely Congress may determine the character of a bridge passing over that portion of an international river of which the United States owns the fee of the lands under water; and Congress having failed to require a roadway and footway to be constructed on such bridge, the State of New York cannot make the construction of such roadway and footway compulsory.

Nor can the State of New York seize hold of a bridge thus chartered and designed by the three

governments participating in its creation solely as an instrument of foreign and interstate commerce and compel it to undertake the business of intrastate commerce upon terms fixed by the State.

RAILROAD CASES:

There are numerous cases in this Court holding that state regulations of the operation of railroads within a state are void when they would result in a burden on interstate commerce.

In *Atlantic Coast Line vs. Wharton* (207 U. S., 328), it was held that the exercise of state authority requiring the stopping of interstate trains at certain stations was an interference with interstate commerce repugnant to the Commerce Clause of the Constitution.

In *St. Louis Southwestern Ry. Co. vs. Arkansas* (217 U. S., 136), a state statute compelling railroads to distribute cars for shipment within five days after written application by a shipper, was held to impose a burden on interstate business repugnant to the Commerce Clause.

In *Southern Ry. Co. vs. Reid* (222 U. S., 424), a state statute requiring common carriers to transport freight as soon as received, under penalties for failure was held to conflict with the authority exercised by Congress over the subject of interstate commerce.

In *Seaboard Air Line Ry. vs. Blackwell*, 244 U. S., 310, it was held that a law of Georgia requiring railroad companies to check the speed of trains before public road crossings, so that trains may be stopped in time should any person or thing be crossing the track there, was a direct and unconstitutional interference with interstate commerce where it appeared that the law would have required an interstate train to come practically to a stop at each of 124 ordinary grade crossings within a distance of 123 miles in Georgia.

Wherever interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress and not the State that is entitled to prescribe the final and dominant rule, otherwise, the nation would not be supreme within the national field.

Minnesota Rate Cases, 230 U. S., 352.

In the *Shreveport* case, where it was held that rates prescribed by a State Railroad Commission for intrastate traffic interfered with interstate rates, this Court said:

"It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rival-

ries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring ‘uniformity of regulation against conflicting and discriminating state legislation.’ By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control.”

“Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field.”

“We are not unmindful of the gravity of the question that is presented when State and Federal views conflict. But it was recognized at the beginning that the Nation could not prosper if interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress

and of the agencies it lawfully established must control."

Houston & Texas Ry. vs. United States,
234 U. S., 342.

This rule has been applied to a variety of circumstances. Thus the Safety Appliance Act has been held applicable to the case of employees of an interstate carrier, though such employees were not at the time of the accident engaged in interstate commerce.

United States vs. Southern Ry. Co., 222
U. S., 20.

Texas & Pacific Ry. Co. vs. Rigsby, 241
U. S., 33.

And the Congressional Hours of Service Act has been held applicable to employees whose duties related both to interstate and intrastate operations.

*Baltimore & Ohio R. R. Co. vs. Interstate,
Commerce Commission*, 221 U. S., 612,
618.

It must follow that Congress having assumed control of this bridge as an instrument of foreign and interstate commerce, for which alone it was created, the State of New York cannot interfere with such control and compel the alteration of the structure so that it may be used as an instrument of intrastate traffic.

An international bridge is a unit in a much stronger sense than an interstate railroad. A railroad is presumed to serve the whole of the territory through which it passes and accommodate local as well as through traffic. A bridge, on the other hand, is a span with fixed termini, whose function is limited to providing a means of transportation between those termini. Although a portion of its structure may pass over land, as is frequently the case, neither the privileges nor obligations of its franchise extend beyond the spanning of its termini, and it cannot be required to serve the territory over which its structure passes.

The parts of the International Bridge over the land upon Squaw Island, the smaller branch of Niagara River, and the canal near Black Rock Harbor, are just as much parts of the whole International Bridge, and are just as necessary to that bridge as a railroad bridge, as is the main part over the main branch of the Niagara River.

No one would have built, or could now afford to maintain any one of these parts except as parts of the whole International Railroad bridge—a bridge well named “The International Bridge” of the defendant “International Bridge Company.” The various parts of this bridge, including the part in question over Black Rock Harbor, upon land deeded to the United States Government by the State of New York, and now owned absolutely by the United States Government, were all built, and this particular part has been rebuilt, as directed by the Secretary of War under the Acts of Congress. When

the construction of this bridge was commenced in 1870, general legislation by Congress upon this subject was not in its present advanced state, but when the bridge was finished, all possible questions of compliance with the Act of Congress of June 30, 1870, were ended for all time by the Act of Congress of June 23, 1874, which in express words "approved" the modifications in the plans for this bridge as suggested by the Board of Engineers of the War Department February 7, 1871. Not only did that act applying to this bridge approve of what was thus done, but it went farther and expressly declared such bridge "to be a lawful structure and an established post route for the mail of the United States." (Finding VII, fol. 214.)

This International Bridge having thus been built under the authority of and with the express approval of the Congress of the United States and the Secretary of War, as the executive officer carrying into effect the legislation of Congress in this particular, and later the particular part of the bridge in question having been rebuilt as directed by the Secretary of War, is the International Bridge Company now compelled to take orders from another master and build additions to the part thus rebuilt? Is the International Bridge Company compelled to serve two masters with reference to this bridge, one the National Government telling it how and where to build or rebuild, and the other the State of New York telling it where to build additions not required by the National Government, to escape severe fines and penalties imposed by the State? If some specu-

lator, or investor, in land upon Squaw Island, or elsewhere, can induce the Legislature of the State of New York to pass a special Act directing this particular Bridge Company to build an addition to its bridge that will be particularly and especially beneficial to his investment in land, can he force the International Bridge Company to do his will if the Legislature put sufficiently heavy fines and penalties in the Act for that purpose?

The answer to these questions is that after the International Bridge Company has repeatedly obeyed the United States Government as required, it cannot be further forced to obey the orders of the State of New York in respect to details as to which the United States Government has left the International Bridge Company entirely free from any requirements whatever. An International Bridge, constructed under national authority, cannot thus be changed into a mere local bridge to Squaw Island by orders from the State of New York.

To cite the cases from *Gibbons vs. Ogden*, 9 Wheaton, 1, to the latest cases decided by this Court, is only to call attention to the stress which they all lay upon the great controlling fact that when the National Government takes and exercises jurisdiction, however slight that exercise may be, such exercise of jurisdiction, in the language of all the cases, is "paramount" and "exclusive" of any other exercise of jurisdiction over the same subject matter. To put the matter in another way: The exercise of the national jurisdiction is "exclusive" in that it excludes any exercise of

jurisdiction by a State, and "inclusive," in that it includes all the details of the subject matter, so that a State may not exercise jurisdiction over one or more of the details just because such details have not been specifically mentioned in the exercise of jurisdiction by the National Government.

The principle to be deduced from all the decisions is that the exercise by Congress of its paramount and exclusive power over a particular subject withdraws it, with all its incidents, from the jurisdiction of the state.

The pith and substance of the matter is that the Legislature of the State of New York has undertaken to amend the special and general acts of Congress with reference to this international bridge, by making additional onerous provisions as to one end of it, wholly ignoring the unequivocal exercise of power by Congress and the Secretary of War in requiring changes in this end of the bridge and in approving tolls to be charged for the use of any highway which might be constructed upon it at the option of the Bridge Company, and in conferring special jurisdiction on the United States District Court over controversies in regard to the use of the bridge by railroads.

POINT V.

The power of Congress over this international bridge is exclusive and all State legislation concerning it is ineffective except in so far as it has been expressly adopted and validated by Congress, because the subject-

**matter involves the external relations of the
United States with foreign governments.**

The trial court expressly found—

“That all of the commerce passing over the bridge of the defendant across the Niagara River, between the City of Buffalo, New York, and the Dominion of Canada, is either interstate commerce or foreign commerce between the United States and foreign nations, and said bridge is an instrumentality of such interstate and foreign commerce.

“That the Niagara River is a navigable water of the United States forming the international boundary between the United States and the Dominion of Canada, a dependency of the British Empire.”

(Decision, Findings XVIII and XIX, pages 63 and 64.)

The Niagara River is subject to the treaty proclaimed May 13, 1910, between the United States and Great Britain, concerning boundary waters between the United States and Canada. This treaty will be more fully considered under our next point. The point which we make now is that the bridging of the Niagara River is as proper a subject for the exercise of the treaty power between the United States and Great Britain as the free navigation of its waters, and hence, is equally outside the province of state government.

Commerce crossing boundary waters by bridge

has the same status as commerce moving along such boundary waters by vessel.

Pennsylvania v. Wheeling & Belmont Bridge Co., 18 Howard, 421.

Gilman vs. Philadelphia, 3 Wallace, 713.

United States v. Railroad Bridge Company, 6 McLean, 517.

The International bridge is a physical link between the United States and a portion of the British Empire, giving access to our territory to foreign peoples and foreign goods. Primarily, it is an instrument of foreign rather than interstate commerce. A large part of the commerce passing over it is strictly foreign, having its origin or destination in a foreign country; the remaining commerce passing over it must cross foreign territory in its passage between the states, and thus takes on the character of foreign rather than merely interstate commerce.

The Bridge Company is an international corporation, created, consolidated and regulated in part by acts of the Parliament of the Dominion of Canada.

(Decision, Finding I, pages 51 and 52.)

The bridge is an international structure, one-half of which lies in Canadian territory and is subject to the jurisdiction of the Canadian government and courts. The physical situation is such that all effective action and legislation concerning the construction, maintenance and operation of the

bridge must of necessity be international in character, and involve continuous relations and joint action and co-operation with the Canadian government. This being the case, it is inherently a subject for exclusive federal jurisdiction, and it is more than doubtful whether the State of New York ever had or could have any power to deal with it, even in the absence of action by Congress.

The theory and genius of our system of government, reserving to the states matters of domestic concern and conferring upon the United States exclusive power over all external relations, negative the power of a state to enter into a co-operative relation with a foreign government for the creation and control of a physical connection between foreign territory and the territory of the United States, to be used as an instrument of foreign commerce and intercourse, and capable of being used as a means of invasion in time of war.

The case differs from the cases previously considered, involving interstate commerce, where the several states may regulate such commerce and its instrumentalities until such time as Congress sees fit to intervene and assume control. In such cases the states have power to act until their power is superseded by the dominant power of Congress. But where external relations and foreign commerce are involved, the states are wholly without power to act, even in the absence of action on the part of Congress. The whole subject-matter is forbidden to them because it involves the relations of the United States with foreign peoples and governments, and the intermeddling

of the states in such matters, upon the ground of inaction on the part of Congress, would inevitably be fraught with danger and mischief.

It follows that all of the state legislation in regard to this bridge, from the original act of 1857 to and including the act of 1915 now before this court, insofar as such state legislation goes beyond the mere creation of a corporation to bridge the Niagara River when and as authorized by Congress and the Parliament of the Dominion of Canada, and the internal management of such corporation, and undertakes to prescribe the terms and conditions upon which the bridge may be constructed and maintained, and to regulate the tolls to be charged and uses to which the structure may be put, is nugatory, except as such state legislation has been expressly adopted by Congress and has derived vitality therefrom.

The original Act of Congress, passed in 1870, adopted and validated the prior state legislation by authorizing the construction and maintenance of the bridge, as provided by the acts of the New York Legislature then in force; but at the same time Congress modified such legislation by introducing new requirements in regard to the construction of the bridge, and by conferring special jurisdiction upon the United States District Court in relation to disputes over its use by railroads. The New York acts thus validated by Congress did not require the construction of a footway and roadway on the bridge, as we have shown under Point II of this brief, and, of course, did not require the corporation to maintain a highway

bridge between Buffalo and Squaw Island. The Act of Congress of 1870 authorized a bridge "which shall be constructed across the Niagara River from the City of Buffalo, N. Y., to Canada", and made no provision for access to Squaw Island.

The act of Congress of 1874, after the completion of the structure, specifically approved the modification of the plans consisting in the omission of the highway wings and declared the bridge *as constructed* (*i. e.*, without footway or roadway, and, of course, without access to Squaw Island), to be a lawful structure. Thereafter the Bridge Company was without authority to construct a highway wing on its bridge.

Congress may have had grave political reasons for approving the omission of the highway feature. Not only would a bridge devoted solely to railroad use be more efficient as an instrument of the vast and important foreign and interstate commerce destined to pass over it, but it is evident that a highway bridge giving easy access from Canada to a large city on the American side, would measurably increase the difficulty of enforcing the immigration laws of Congress, and might easily furnish the seed of international complications in other respects.

The New York Act of 1915, requiring the construction of a highway bridge between Buffalo and Squaw Island, never having been adopted or validated by Congress, and being inconsistent with all federal legislation and administrative action relating to the International bridge, is a mere nullity, a mere unauthorized meddling by the

State of New York with a physical connection between the United States and foreign territory and instrument of foreign commerce, involving the external relations of the United States with the British Empire.

The decisions of this court amply sustain our contention that the United States, like every other sovereign nation, has inherent and exclusive control over its boundaries for the purpose of protecting its territory against invasion, of excluding or regulating the admission of aliens and foreign goods, and of regulating, in all respects, its external relations with foreign nations. Such power "is inherent in sovereignty and essential to self preservation".

Turner v. Williams, 194 U. S. 279, 290.

"In the United States this power is vested in the National Government to which the Constitution has committed the entire control of international relations in peace as well as in war. It belongs to the political department of the government and may be exercised either through treaties made by the President and Senate or through statutes enacted by Congress."

Nishimura Ekiu v. United States, 142 U. S. 651, 659.

"The authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject."

Oceanic Navigation Company v. Stranahan, 214 U. S. 320, 340.

Is not the creation and regulation of a bridge between Canada and the United States an obvious aspect of that subject?

The power of Congress over foreign commerce has been described by this court as "plenary", "exclusive and absolute" and "complete and absolute".

Butfield v. Stranahan, 192 U. S. 470, 493, 494.

U. S. v. 43 Gallons of Whiskey, 93 U. S. 188, 194.

Head Money Cases, 112 U. S. 580, 591.

Oceanic Navigation Co. v. Stranahan, 214 U. S. 320, 343.

In upholding the act of Congress excluding Chinese laborers from the United States, this court said:

"While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel

invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations. As said by this court in the case of *Cohens v. Virginia*, 6 Wheat. 264, 413, speaking by the same great Chief Justice: 'That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In making peace we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can then in effecting these objects legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are

constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.' The same view is expressed in a different form by Mr. Justice Bradley, in *Knox v. Lee*, 12 Wall. 457, 555, where he observes that 'the United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all which are forbidden to the state governments.'

* * * * *

"For local interests the several States of the United States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

The Chinese Exclusion Case, 130 U. S.
581, 604, 605, 606.

In a later case this court said:

"The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the govern-

ment of the Union; and the only American flag known throughout the world is the flag of the United States.

The Constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the commander-in-chief of the army and navy; has authorized him, by and with the consent of the Senate, to make treaties, and to appoint ambassadors, public ministers and consuls; and has made it his duty to take care that the laws be faithfully executed. The Constitution has granted to Congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the Constitution in the government of the United

States, or in any department or officer thereof. And the several States are expressly forbidden to enter into any treaty, alliance or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another State, or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

Fong Yue Ting v. United States, 149 U. S. 698, 711, 712.

The power of the federal government to deal with international questions involving foreign intercourse is exclusive, and even in the absence of treaties or acts of Congress on the subject, such matters cannot become the subject of negotiation or joint action between a state of the Union and a foreign government.

United States v. Rauscher, 119 U. S. 407, 414.

In denying the right of the State of Vermont to extradite to Canada a fugitive from justice, Chief Justice Taney said, in an early case:

"All the powers which relate to our foreign intercourse are confided to the general government. Congress have the power to regulate commerce; to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; to declare war; to grant letters of marque and

reprisal; to raise and support armies; to provide and maintain a navy. And the President is not only authorized, by and with the advice and consent of the Senate, to make treaties; but he also nominates, and by and with the advice and consent of the Senate appoints ambassadors and other public ministers, through whose agency negotiations are to be made, and treaties concluded. He also receives the ambassadors sent from foreign countries; and every thing that concerns our foreign relations, that may be used to preserve peace or to wage war, has been committed to the hands of the federal government."

* * * * *

"The states are forbidden to enter into any 'agreement' or 'compact' with a foreign nation; and as these words could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive."

* * * * *

"The word 'agreement', does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an 'agreement'. And the use of all of these terms, 'treaty', 'agree-

ment', 'compact' show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a state and a foreign power; and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties."

* * * * *

"Can it be supposed that the constitutionality of the act depends on the mere form of the agreement? We think not. The Constitution looked to the essence and substance of things, and not to mere form. It would be but an evasion of the Constitution to place the question upon the formality with which the agreement is made. The framers of the Constitution manifestly believed that any intercourse between a state and a foreign nation was dangerous to the Union; that it would open a door of which foreign powers would avail themselves to obtain influence in separate states. Provisions were therefore introduced to cut off all negotiations and intercourse between the state authorities and foreign nations. If they could make no agreement, either in writing or by parol, formal or informal, there would be no occasion for negotiation or intercourse between the state

authorities and a foreign government. Hence prohibitions were introduced, which were supposed to be sufficient to cut off all communication between them.

But if there was no prohibition to the states, yet the exercise of such a power on their part is inconsistent with the power upon the same subject conferred on the United States."

Holmes v. Jennison, 14 Peters, 540, 570, 571, 573, 574.

The prohibition of the constitution against a state entering into any agreement or compact with a foreign power without the consent of Congress, applies to such agreements or compacts as are in their nature political.

Virginia v. Tennessee, 148 U. S. 503, 519.

The establishment of a physical connection between the territory of this country and a foreign nation must always raise a political question as to the safety and expediency of such a connection. In this respect it differs vitally from the establishment of such a physical connection between states of the Union. The agreement being political in nature, it matters not how informally it may be made, it falls within the prohibition of the constitution.

Holmes v. Jennison, 14 Peters 540.

Exclusive of any legislation on the subject, no one, alien or native, has any right to establish a

physical connection between the shores of this country and any foreign country, without the consent of the United States. Whether such consent shall be granted or refused is a political question which, in the absence of legislation, would seem to rest with the executive.

U. S. vs. La Compagnie Francaise Des Cables Telegraphiques, 77 Fed. Rep. 495.

The New York Court of Appeals, in holding unconstitutional an act of the New York Legislature providing for the surrender of fugitives from justice from foreign countries, at a time when Congress had not acted upon the subject, said:

"The general government might adopt a policy of refusing to make an extradition treaty with all nations, or it might refuse as to Belgium or any other particular country. It cannot be said from the absence of a treaty with any country or all countries, that the power is dormant. It may be as much exercised by refusing as by making a treaty. * * * The nature of the power is such that it cannot be dormant. It is necessarily in active exercise by the government when acting or omitting to act. The dormant powers are such as the States may exercise over their internal affairs without colliding with the action or non-action of the general government. * * * But the dormant powers, as they are called, are those which may be

exercised for the protection of the States within their territories, and relate to their internal affairs. As to foreign intercourse and all questions relating thereto, the government alone can speak and act, and the power is therefore necessarily exclusive."

People v. Curtis, 50 N. Y. 321, 328.

And for like reasons the inference to be drawn from the silence and inaction of Congress in relation to foreign commerce as excluding state action is far stronger than in relation to interstate commerce.

*** * * the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than affecting commerce among the states. Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation. The organization of our state and Federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States and its laws and treaties. *Henderson v. Mayor of New York* (92 U. S. 259, 273).

The same necessity perhaps does not exist equally in reference to commerce among the States."

Bowman v. Chicago, etc. Ry. Co., 125 U. S. 465, 482.

Crutcher v. Kentucky, 141 U. S. 47, 57.

Buttfield v. Stranahan, 192 U. S. 470, 492, 493.

Passenger Cases, 7 Howard, 283.

The application of these principles to the construction, maintenance and operation of an International bridge, connecting the territory of the United States with the territory of a foreign nation is clear.

Our relations with the Dominion of Canada have been so long unclouded that danger along this frontier appears remote. Yet little more than one hundred years ago the Canadian frontier was the scene of active warfare. The Village of Buffalo was burned by British troops, and important battles took place within a few miles of the Canadian terminus of this bridge. At the close of the Civil War, in 1866, and but four years before this bridge was authorized by Congress, the friendly relations between Great Britain and the United States were again threatened by a Fenian raid into Canada, which was organized and started from the City of Buffalo. Two battles were fought within 10 miles of the Canadian end of the bridge, one at Fort Erie and the other at Ridgeway, before the invaders were repulsed. During the early years of the World War just ended,

while our nation was still neutral, unceasing vigilance on the part of the federal authorities was required to prevent our territory, and in particular the City of Buffalo, from becoming a starting point of intrigues and attacks against the Dominion of Canada.

It must also be remembered that any rule adopted here will apply equally to our southern border, where conditions are by no means reassuring. The disturbances along the Mexican Border for several years past illustrate our contention. On that frontier there have been frequent raids into United States territory, accompanied by outrages against peaceful inhabitants, who have lived under a continuous threat of war. A considerable force of United States troops was stationed along the border during the year 1916-1917. After we became involved in the World War, it is alleged by competent authority that Mexican territory proved a haven for alien enemies plotting against the United States.

Assuming that Congress had not spoken on the subject, could the Legislature of Texas, for example, for the purpose of increasing local trade, enter into negotiations with Mexico, or provide by concurrent legislation for a bridge across the Rio Grande, at some strategic point, which might offer to the enemies of the United States easy access to its territory? Is not this precisely one of the perils which the Constitution aimed to prevent? Is not the subject so involved, not only with the regulation of foreign commerce, but also with the protection of the United States against invasion, the security of its territory, the exclusion of un-

desirable aliens, the escape of fugitives from justice and of political offenders across the border, and other matters involving the external relations of the United States with foreign governments, that in its very nature it must rest under the exclusive power of the general government? Is not every act of a state government, assuming to authorize such an international bridge, or to regulate its operation and use after it is constructed, a usurpation of power by the state and a mere nullity, unless validated by subsequent adoption by Congress? We believe that the decisions of this court to which we have referred give an affirmative answer to this question.

This court will not be misled by the circumstance that the highway bridge which the state now requires the Bridge Company to attach to its structure would lie wholly within the territory of the United States, and the State of New York. If the state has power to compel the construction on this international bridge of a highway bridge to Squaw Island, it has equal power to compel the construction of a highway wing on the bridge as far as the international boundary, and if Canada should then choose to compel the construction of such a wing on the portion of the bridge within her territory, the result would be that the construction of a highway bridge across the international boundary might be compelled by the New York and Canadian governments acting concurrently, without any action or consent of Congress.

POINT VI.

The Court of Appeals erred in holding that the New York Act of 1915 did not contravene the treaty entered into by and between the United States and Great Britain, proclaimed May 13, 1910, concerning boundary waters between the United States and Canada.

The right and immunity of the plaintiff in error under the treaty with Great Britain, proclaimed in 1910, was expressly raised in the Court of Appeals, though entirely ignored in the opinion of that learned court.

The relevant portions of this treaty are as follows:

“PRELIMINARY ARTICLE”:

“For the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

"ARTICLE I":

"The High Contracting Parties agree that the navigation of all navigable boundary waters shall forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries."

Article V regulates the diversion of water from the Niagara River.

The federal government has thus recognized that the commerce across the Niagara River is not merely national but international. This court in discussing a burdensome regulation imposed by the State of New York on ship masters as a condition of landing passengers, said:

"A regulation which imposes onerous, perhaps impossible, conditions on those engaged in active commerce with foreign nations, must of necessity be national in its character. It is more than this; for it may properly be called *international*. It belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. If our government should make the restrictions of these burdens on commerce

the subject of a treaty, there could be no doubt that such a treaty would fall within the power conferred on the President and the Senate by the Constitution. It is in fact, in an eminent degree, a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected, whether the rule be established by treaty or by legislation."

* * * * *

"It is apparent, therefore, that, if there be a class of laws which may be valid when passed by the States until the same ground is occupied by a treaty or an act of Congress, this statute is not of that class."

Henderson v. New York, 92 U. S. 259,
273.

Not only is the commerce upon and across the Niagara River, including Black Rock Harbor as an "arm" thereof, clearly a proper subject for the exercise of the treaty-making power of the general government and hence forbidden to the state, but it appears that that power has been exercised by the general government, and that a treaty between the United States and Great Britain, regulating such commerce and protecting the freedom of navigation upon the river for the benefit of the inhabitants of both nations, is now in force. That the construction of a highway wing on the Black Rock Harbor draw of the International Bridge, by widening the structure, might increase the obstruction to the free navigation of

this arm of the Niagara, is clear. The United States and Great Britain having by treaty taken under their protection the commerce on the Niagara, the State of New York is wholly disabled from interfering therewith in the slightest degree. This applies equally to commerce across the river by bridge, as to commerce along the river by vessel. There is no legal distinction between these two forms of commerce, or the power of the general government in relation thereto.

Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421.

Gilman v. Philadelphia, 3 Wallace, 713.

Latinette v. St. Louis, 201 Fed. Rep. 676.

The treaty-making power having acted on the general subject of commerce upon the Niagara, its silence in regard to commerce crossing the Niagara River by bridge did not leave that subject to the control of the State of New York, but amounted to a declaration that such commerce should be free from state interference.

United States v. Rauscher, 119 U. S. 407, 414.

Bowman v. Chicago Ry. Co., 125 U. S. 465, 482.

People v. Curtis, 50 N. Y. 321, 328.

The question whether federal jurisdiction over the Niagara River is exclusive, or subject to State interference, is a public question of gravest moment. Congress assumed jurisdiction over this

river in connection with the diversion of water at Niagara Falls by the so-called Burton Act of January 29, 1906, and in 1910 the above treaty was entered into by the United States and Great Britain providing for the freedom of navigation of all boundary waters between the United States and Canada, including the Niagara River, and also for the diversion of water from this river above the Falls. At every session of Congress since 1910 bills have been introduced to regulate the diversion of water pursuant to the treaty. Officials of the State of New York, including ex-Governor Glynn, ex-Attorney General Carmody, the Chairman of the Conservation Commission and members of the Joint Committee appointed by the Legislature in relation to the development of Niagara Falls power, appeared at Congressional hearings and asserted what they deemed to be the rights of the State of New York in relation to the Niagara River. After hearing these officials the Committee on Foreign Affairs made a report to Congress July 20, 1914, recommending the passage of the bill then before Congress, from which we quote the following:

“The committee believes that the jurisdiction of the Federal Government over the Niagara River, once asserted in conjunction with the Dominion of Canada under treaty relations, is unquestionable and paramount; that it is the duty of the Federal Government to assume complete and permanent jurisdiction of the boundary waters between the two countries, subject only to the incidental rights

of the riparian owner when these rights do not conflict with such Federal authority. Under the constitutional power to take jurisdiction for navigation and commercial purposes, it may well be assumed that such authority is inclusive of the further jurisdictional rights, because the Niagara River is a boundary stream and navigable and a means of national defense. Involved as Niagara River is with the Great Lakes and other boundary streams which, together, constitute more than 1,000 miles of these boundary waters, it is difficult to discern why exclusive control of these boundary waters ought not to exist in the Federal Government. Intimately connected as they are with such important interests, of great moment to the United States and the Dominion of Canada, it is not conceivable how any other authority than the Federal Government could invoke jurisdiction." * * *

"It has been suggested that no permit by the General Government for diversion of water should be issued without the consent of the State in which the diversion occurs. The committee believes that there are several reasons why the Secretary of War should have charge of the diversion. First, it is not the policy of the Government to share jurisdiction with a State or to confer concurrent jurisdiction upon a State over a subject matter where the Federal authority assumes to exert complete control."

POINT VII.

The Court of Appeals erred in applying to this case the rule applicable to navigable rivers wholly within a single state.

Upon this subject the court said:

"After the consolidation took place the defendant had the right to build the bridge. The state of New York, however, had the title to, and governmental control of, the land under the waters of the river. This control, nevertheless, was subject to the supervision of the United States in so far as commerce was concerned, but this supervision did not give to the United States government, as against the state of New York, the authority to construct a bridge, nor could it take the state's property in the bed of the river for that purpose any more than it could take property elsewhere without condemnation and payment. It could give its consent to the construction of a bridge upon such terms as it saw fit and even after the bridge was built, if it interfered with commerce, could withdraw its consent and compel its removal. It did consent that defendant construct piers for the bridge on property of the state and the bridge, with the consent of the state, was built on such property. No way was provided for pedestrians or vehicles. It was built primarily for interstate and foreign commerce, but this did not give the United States any

other or greater supervision over it than it otherwise had. It could simply regulate its use for interstate and foreign commerce. This did not subject the defendant to the control of the United States government in any other respect. It still remained a New York corporation which state had the power to regulate within its limits matters of internal police, including in that general designation 'whatever would promote the peace, comfort, convenience and prosperity of its people.' This power included among other things the construction of bridges within its territory. It is only so much of the bridge which is here being considered as lies entirely within the state of New York, and while it gave the right, in the first instance, to construct the bridge, it retained the right, in the interest of the people of the state, to supervise and direct how it should be used, subject only to the Federal government's regulations so far as such use might relate to interstate and foreign commerce. The relation thus existing between the parties was not, in my opinion, changed by the fact that the state of New York ceded to the United States the land under the waters of the Niagara river including a portion of the Erie canal adjacent to Black Rock harbor. At the time the grant was made the bridge had been built. It rested on piers in the river. The grant, of course, was subject to visible rights then existing and theretofore obtained. These rights could not be

destroyed by a grant from the state to the United States. As before indicated, the United States could, before acquiring the grant, have compelled the defendant to remove the bridge. It could have done this just as well before the grant was made as it could afterwards. The power to do this existed independent of the grant and in no way depended upon it. It was one which the Federal government inherently possessed for the purpose of controlling interstate and foreign commerce. *Escanaba Co. v. Chicago*, 107 U. S. 678; *Cummings v. Chicago*, 188 U. S. 410.)”

* * * * *

“The case now before us, so far as the contention is made that the Federal government has assumed exclusive control of the bridge, is governed, as it seems to me, by *Cummings v. Chicago* (*supra*) and the authorities there cited.”

People v. International Bridge Co., 223 N. Y. 137, 145, 146, 147.

The Court of Appeals plainly erred in its conception of the nature and extent of the Federal power over foreign and interstate commerce, as appears by its statement that Federal supervision over interstate and foreign commerce “did not give to the United States government as against the State of New York authority to construct a bridge, nor could it take the state's property in the bed of the river for that purpose.”

It is well settled that Congress may confer upon a public or private corporation, organized under the laws of a state, the right to bridge an interstate or international boundary stream without the consent and even against the objection of the states affected, and may confer upon such corporation the power of eminent domain, to be exercised within the states; or, if it prefers, Congress may act directly.

Stockton v. Baltimore & N. Y. R. Co., 32

Fed. Rep. 9; Appeal dismissed 140
U. S. 699.

Decker v. Baltimore & N. Y. R. Co., 30
Fed. Rep. 723. ?

*Pennsylvania Ry. Co. v. B. & N. Y. R. R.
Co.*, 37 Fed. Rep. 129.

Bridge Co. v. U. S., 105 U. S. 470, 475.

Luxton v. North River Bridge Co., 153
U. S. 532.

The whole matter is succinctly stated by the Circuit Court of Appeals, 7th Circuit, in a recent case:

"That the construction and operation of the bridge across the Mississippi, so that the bridge should not obstruct navigation of the waterway, and that the bridge and its necessary approaches might serve as a postroad and as a landway for interstate commerce, were national matters, that the nation had the right itself to build and maintain the bridge and approaches, and, for the purpose

of acquiring land for the approaches, to exercise the power of eminent domain either directly or through a corporation created by it for that end, without the consent or over the objection of the state—are propositions too well settled to warrant elaboration or debate. *Kohl v. U. S.*, 91 U. S. 367, 23 L. Ed. 449; *California v. Pacific R. Co.*, 127 U. S. 39, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Luxton v. North River Bridge Co.*, 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808; *Wilson v. Shaw*, 204 U. S. 24, 27 Sup. Ct. 233, 51 L. Ed. 351. Contention is therefore narrowed to this: That Congress could not constitutionally select appellee as the agency through which a national power should be exercised. Nothing in the Constitution forbids the selection of a state corporation as a national agent. In reason the material thing is the principal's authority, not the parentage or birthplace of the agent. And the decisions of Mr. Justice Bradley at circuit in *Stockton v. B. & N. Rld. Co.* (C. C.) 32 Fed. 9, and of the Supreme Court in *Cherokee Nation v. Kansas Ry. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295, explicitly cover the point."

Latinette v. City of St. Louis, 201 Fed. Rep. 676, 678, 679.

The franchise to bridge the Niagara came from Congress, which was alone competent to grant it. This is apparent from the fact settled by abundant authority that the bridge could be built on the

authority of Congress alone, even against the objection of the state, while, on the other hand, any authority received from the state was always subordinate to the paramount action of Congress and might, at any time, be revoked by it.

Monongahela Navigation Co. v. U. S., 148 U. S. 312, 342.

Union Bridge Co. v. U. S., 204 U. S. 364.

Monongahela Bridge Co. v. U. S., 216 U. S. 177.

Congress has supreme control of a navigable stream where the commerce thereon is foreign or interstate.

United States v. Rio Grande, 174 U. S. 690.

Union Bridge Co. v. U. S., 204 U. S. 364.

Philadelphia Co. v. Stimson, 223 U. S. 605.

Hagerla v. Mississippi R. P. Co., 202 Fed. Rep. 776.

Congress has always carefully distinguished the construction of bridges over navigable waters wholly within a single state and the construction of bridges over waters not wholly within a single state.

Thus, in the Act of Congress of Sept. 19, 1890, (Chap. 907) Congress prohibited the erection of bridges over navigable waters under state legislation before the approval of the plans by the Secretary of War, and added this proviso:

"PROVIDED, That this section shall not * * * be so construed as to authorize the construction of any bridge * * * or other works under an act of the Legislature of any state over or in any stream * * * or other navigable water not wholly within the limits of such state."

This act is historically important as showing the public policy of Congress in regard to navigable waters not wholly within one state.

The General Rivers and Harbors Act of 1899, now in force, also emphasizes the distinction between bridges over streams entirely within a single State and bridges across interstate or international streams:

"Construction of Bridges, etc., over Navigable waters; approval of plans.

It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War; *Provided, that such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location*

and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced * * *."

*Act of March 3, 1899, Chap. 425, Sec. 9,
U. S. Compiled Statutes, 1916, Section
9971.*

This Act permits structures to be built across waterways wholly within the limits of a single State under authority of the legislature of the State with the approval of the Secretary of War, *but requires the consent of Congress* in addition to the approval of the plans by the Secretary of War, in the case of navigable waters not wholly within the limits of a single State, thus manifesting the intent of Congress to exercise exclusive control over such structures.

In the case of waters wholly within the limits of a single state, the Secretary of War merely regulates the form of the structure as a possible obstruction to navigation; but *Congress confers the franchise* to cross an interstate or international waterway.

In a more recent Act, passed in 1906, Congress assumes an even more extensive jurisdiction of bridges thereafter constructed, requiring such bridges to grant equal privileges to all telegraph and telephone companies and in the case of railroad bridges, to all railroad companies desiring to use the same, and authorizing the Secretary of War to fix the rates for railroads and the tolls for street cars, vehicles and foot passengers, etc.

Act of March 23, 1906, Chap. 1130, Secs. 1, 2, 3 and 4.

The charter received from the State of New York conferred no right upon the International Bridge Company to bridge the Niagara River until authority had been secured from Congress, and the present right of the Bridge Company to maintain its structure in its existing form and location depends, not upon the charter received from the State of New York, but upon the special acts of Congress, authorizing the construction of the bridge, and declaring it to be a lawful structure when completed, and the subsequent consents procured from the Secretary of War when the bridge was reconstructed in 1899, and the Black Rock Harbor span was reconstructed between 1907 and 1910.

The Niagara River, instead of being a stream "wholly within the limits of a single State," is along its entire length an international boundary stream, over which jurisdiction is exercised by the United States and by a foreign nation. This plaintiff in error owes its existence to foreign as well as domestic legislation. Black Rock Harbor is that portion of the Niagara River which flows to the east of Squaw Island and is as much a part of the international stream as the portion to the west of Squaw Island where the international boundary line is located.

The Court of Appeals, in support of its decision, cites *Cummings vs. Chicago*, 188 U. S., 410, and like cases, asserting the concurrent jurisdiction of the National and State governments over navi-

gable waters. The *Cummings* case is deemed to be peculiarly in point, because it there appears that the Calumet River was improved by the Federal government and that the "right of way" (not, however, the fee of lands under water as in this case), was conveyed to the United States (188 U. S., p. 413), that the Secretary of War consented to the construction of a dock by plaintiff, which plaintiff thereupon undertook to build without obtaining a permit from the Department of Public Works of the City of Chicago, as required by the City Ordinance, and this Court held that this could not be done. The Court of Appeals wholly overlooked the determining factor in that case, which was that the Calumet River was situated *wholly within the limits of the State of Illinois*. Thus this Court, referring to the Rivers & Harbors Act of 1890 says:

"The construction claimed for the statute is that its purpose was to deprive the States of all power as to every stream, *even those wholly within their borders*, whilst the very words of the statute, saying that its terms should not be construed as conferring on the States power to give authority to build bridges on streams not wholly within their limits, by a negative pregnant with an affirmative, demonstrate that the object of the act was not to deprive the several States of the authority to consent to the erection of bridges over navigable waters *wholly within their territory.*

* * * * *

We do not overlook the long-settled principle that the power of Congress to regulate commerce among the States 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons vs. Ogden*, 9 Wheat., 1, 96; *Brown vs. Maryland*, 12 Wheat., 419, 446; *Brown vs. Huston*, 114 U. S., 630. But we will not at this time make any declaration of opinion as to the full scope of this power or as to the extent to which Congress may go in the matter of the erection, or authorizing the erection of docks and like structures in navigable waters *that are entirely within the territorial limits of the several States.*" (Italics ours.)

This feature exists in all of this line of cases and is emphasized by this Court.

Escanaba Co. vs. Chicago, 107 U. S., 678, 683.

Lake Shore & Michigan Southern Ry. vs. Ohio, 165 U. S., 365.

There is also a distinction between administrative acts of the Secretary of War and the deliberate exercise of authority by Congress by express legislation, such as we have here, which is essential to the creation of a franchise.

Hubbard vs. Fort, 188 Fed. R. 987.

Black Rock Harbor is the east branch of the Niagara River, where it is separated by Squaw Island. It existed in its natural state when

the first white man penetrated the wilderness along the Niagara Frontier.

The Bridge Company's charters from the State of New York and the Dominion of Canada, and its special franchise from Congress, and finally the decision in this case, all expressly recognize Black Rock Harbor as part and parcel of the Niagara River.

Laws of 1857, Chapter 753, created the appellant:

"for the construction, maintaining and managing a bridge *across the Niagara River* . . . said bridge to be constructed with two draws one across the Black Rock Harbor and the other across the main channel of the River."

The language of the Canadian charter, printed on page 6 of this brief, is almost identical. The act of Congress from which the Bridge Company's franchise is derived, goes further and omits Black Rock Harbor entirely, speaking only of a bridge across the Niagara River.

The learned Trial Court expressly found:

"That the Niagara River is a navigable water of the United States forming the international boundary between the United States and the Dominion of Canada, a dependency of the British Empire."

"That Black Rock Harbor is the name of *that part of said Niagara River* which passes between the mainland of the United States

and Squaw Island in such river." * * *
(Decision, Findings XIX and XX, p. 64.)

Black Rock Harbor is included in the definition of boundary waters contained in the Treaty between the United States and Great Britain, concerning boundary waters between the United States and Canada, proclaimed May 13, 1910, before referred to, which defines boundary waters as "the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portion thereof along which the international boundary between the United States and the Dominion of Canada passes, including all bays, *arms* and inlets thereof." * * *

This treaty provides for the freedom of navigation on such boundary waters, besides regulating the diversion of water. It unquestionably covers Black Rock Harbor.

At an early date Black Rock Harbor was improved to some extent by the State or local authorities. It was never a part of the Erie Canal, but the canal was constructed along the easterly shore of the harbor and was separated from it by a narrow strip of land down to the time when the harbor was improved by the United States Government, as appears by the deed, found by the court, from the State of New York to the United States, conveying "all the right, title and interest of the State of New York in and to said lands and waterways, including the portion of the Erie Canal and tow path *adjacent* to Black Rock Harbor and the lands under the water of the Black

Rock Harbor." The deed, which was not restricted to use for navigation, unquestionably conveyed the fee if the State possessed it.

The court found further that "said lands and waters have ever since been under the exclusive jurisdiction and control of the United States, which has exercised undisputed authority over them in connection with the improvement of Black Rock Harbor; * * * that said lands include the lands crossed by the Black Rock Harbor span of defendant's bridge" (Decision, Finding XII, pp. 35, 36).

These findings, as well as the maps in evidence, establish conclusively that Black Rock Harbor is the east branch of the Niagara River. Because the Erie Canal at this point was constructed directly adjacent to Black Rock Harbor on the east, being separated from it only by a narrow strip of land, and this portion of the canal was included in the improvement undertaken by the National Government, it was necessary for the Canal Board to pass a resolution abandoning this portion of the Erie Canal—not, as counsel would have it, because Black Rock Harbor was deemed a part of the Erie Canal, which it never was.

The fact that the State or local authorities many years ago, undertook to improve the easterly branch of the natural stream by deepening it and building a retaining wall for a distance, did not alter its status as part of the Niagara River, an international boundary stream. (*U. S. vs. Cress*, 243 U. S. 316, 326.) Nor is it important that this easterly branch of the river, for the little distance it threads its way around Squaw Island, is wholly

within the United States and the State of New York. It is none the less a part of the international boundary stream, and as such always subject to the paramount authority of Congress, and the treaty making power.

The purpose of counsel's desperate effort to divorce the east branch of the river from the west branch, and treat it as a separate entity, is to transform Black Rock Harbor into a waterway wholly within the State of New York, for the purpose of bringing this case within the rule of *Cummings vs. Chicago* (188 U. S., 410), and like cases, which rule has no application to an international stream like the Niagara River.

If we have erred as to the Calumet River, or the navigable portion of it being wholly within one state, this Court in the *Cummings* case also erred, for it based its decision expressly upon this ground. Whatever may be the status of the Calumet River, it cannot be doubted that the Niagara River is not a waterway "the navigable portions of which lie wholly within the limits of a single state," which is the only kind of a waterway over which a bridge may be built "under the authority of the Legislature of a state" in the express words of the Act of Congress March 3, 1899, Chap. 425, Sec. 9. Whenever a bridge is to be built over a river, the navigable portions of which do not lie wholly within the limits of a single state, the franchise must be sought from Congress under the terms of the act.

Nor will the police power of the state, invoked by the Court of Appeals, avail to save this legislation.

This Court, considering the nature and limitations of the police power, has said:

"This power must, however, be exercised in subordination to the provisions of the Federal Constitution. If, in the assumed exercise of its police power, the legislature of a State directly and plainly violates a provision of the Constitution of the United States, such legislation would be void.

Lake Shore, etc. R. R. Co. vs. Smith, 173 U. S., 684, 689.

Looney v. Crane Co., 245 U. S. 178.

POINT VIII.

The judgment of the court below should be reversed and the complaint should be dismissed.

First: Because the statute in question (Chap. 666 of the New York Laws of 1915) impairs the obligation of contracts and interferes with the vested property rights of the plaintiff in error in its special franchises, granted by the State of New York and the Dominion of Canada, and the Congress of the United States, to construct and maintain a bridge across the Niagara River from the City of Buffalo to Canada, by requiring it to construct and operate a highway bridge from Buffalo to Squaw Island and changing and reducing the tolls fixed in the acts of incorporation and approved by Congress.

Second: Because the rates fixed by this statute

change and reduce the rates adopted by Congress, and are confiscatory, and deprive the plaintiff in error of its property without due process of law, and the decision of the state courts that said rates are not confiscatory is based upon the earnings of the corporation in foreign and interstate commerce, which cannot be considered in this connection.

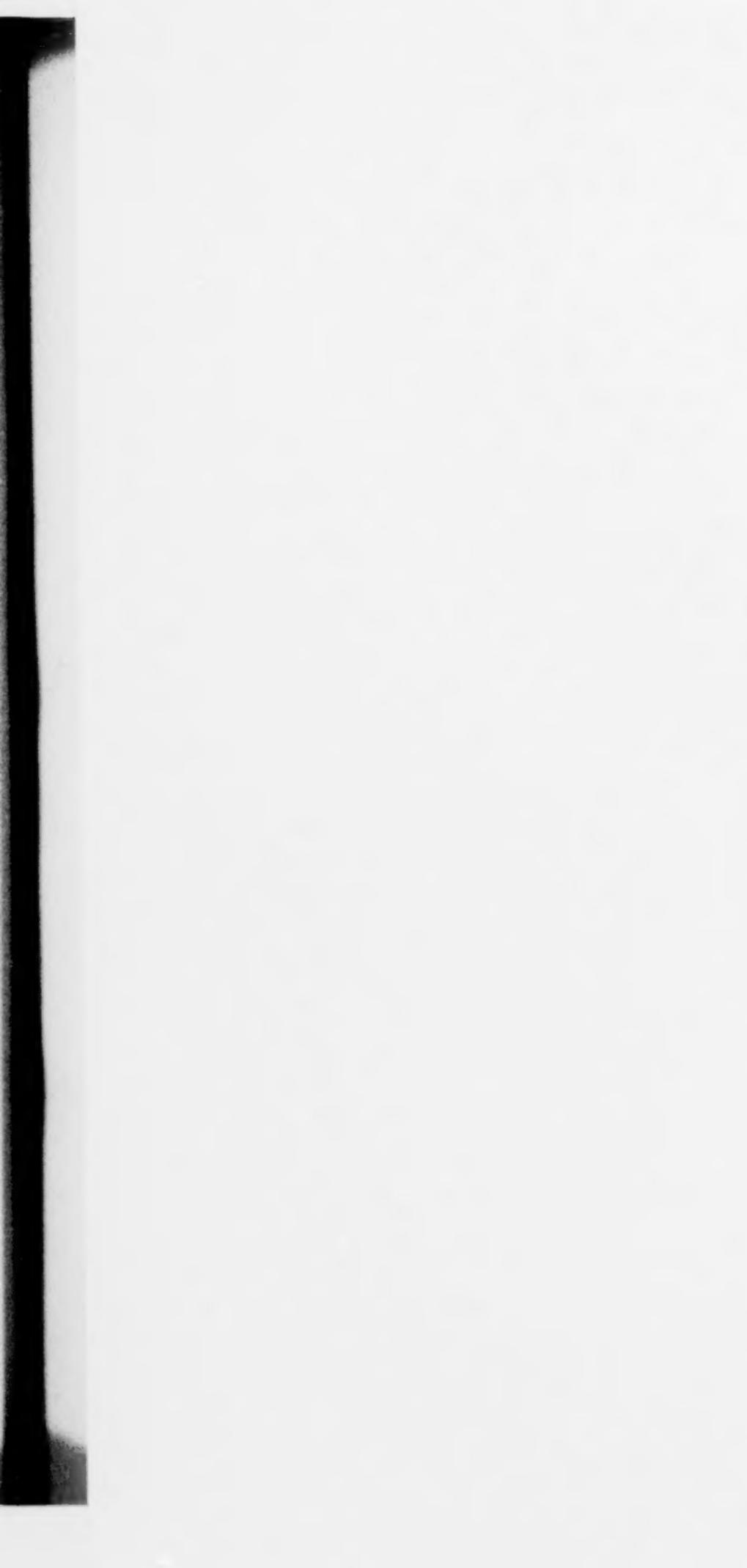
Third: Plaintiff in error acquired its franchise for the construction and maintenance of its bridge across an international boundary stream from Congress, and Congress has repeatedly asserted and exercised its paramount jurisdiction over this stream and over this bridge, including specifically Black Rock Harbor and the span of the bridge crossing over it. The stream is also governed by treaty between the United States and Great Britain and the whole subject-matter rests under the exclusive power of the federal government, which has constantly exercised that power under the commerce and treaty clauses of the federal constitution.

MOOT, SPRAGUE, BROWNELL & MARCY,

Attorneys for Plaintiff-in>Error,

Office and P. O. Address,
302 Erie County Bank Bldg.,
Buffalo, N. Y.

A. M. MOOT,
HENRY W. SPRAGUE,
WILLIAM L. MARCY and
HELEN Z. M. RODGERS,
of Counsel.



OCT 4 1920

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 46.

INTERNATIONAL BRIDGE COMPANY

PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF
NEW YORK,

DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Petitioner.

ADELBERT MOOT,
HENRY W. SPRAGUE,
WILLIAM L. MARCY and
HELEN Z. M. RODGERS.
Of Counsel.



Supreme Court,

OF THE UNITED STATES

INTERNATIONAL BRIDGE COMPANY.

Plaintiff in Error,

AGAINST

PEOPLE OF THE STATE OF NEW YORK,

Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR

Description and Location of International Bridge.

The International Bridge is a structure 3494 feet, or about two-thirds of a mile long, extending across the Niagara River from the City of Buffalo to Canada. It consists of three parts, (1) a double track railroad bridge 432 feet long across Black Rock Harbor so-called, which is really the east branch of the Niagara River, improved and converted into a ship canal by the Federal Government; (2) trestle work 1167 feet in length across Squaw Island, filled in so as to present the appearance of a solid embankment and supporting two railroad tracks; (3) a single track railroad bridge 1895 feet long across the west branch and

main channel of the Niagara River along which the International boundary line runs. (Record page 298, folios 382-383)

CHRONOLOGY

For the convenience of the Court, we assemble the important dates in the history of the bridge.

1857: A special act of the New York Legislature (Chapter 753, Laws 1857) incorporated the Bridge Company and a corporation of the same name was created by Act of the Dominion of Canada for like purposes, (Chapter 227, 20th Victoria). Both acts provided for a bridge from Buffalo to Canada. Neither provided for access to Squaw Island. The New York Act provided "said bridge *may* be constructed as well for the passage of persons on foot and in carriages, and otherwise, as for the passage of railroad trains." The Canadian Act substituted the word "*shall*" for "*may*".

1869: Acts passed by the New York Legislature (Chapter 550, Laws 1869), and Dominion Parliament (Chapter 65, 32nd. and 33rd. Victoria) authorized the consolidation of the two corporations into a single corporation possessing all the rights, privileges and franchises, and subject to all the disabilities and duties of each of such corporations. The corporations were accordingly consolidated.

1870: Act of Congress authorized the construction of the bridge and imposed additional conditions and requirements (Act June 30, 1870, Ch. 176).

1870-1874: Bridge constructed as a railroad bridge exclusively without provision for footway or roadway, original plans including such footway and roadway having been modified.

1874: Act of Congress approved modification in the plans and declared bridge *as constructed* to be a lawful structure. (Act of June 23, 1874, Ch. 475).

1881: Decision of Ontario Court of Appeal that provision in Canadian Act of 1857 for footway and roadway was permissive, not mandatory, notwithstanding the use of the word "shall"; also holding that the work was within the jurisdiction of the government and Parliament of Canada, and the Attorney General of Ontario was not the proper party to file an information seeking in effect to compel a specific performance of the Act of Parliament.

1899: Superstructure of bridge rebuilt. Plans approved by Secretary of War showing footway and roadway across bridge from Buffalo to Canada, but no access to Squaw Island. Footway and roadway omitted in rebuilding because piers would not stand additional widening.

1901: Change in plans reported to War Department, which acquiesced therein. (Decision Finding X, p. 57-58).

1902-1910: Black Rock Harbor improvement undertaken and carried out by Federal Government.

1904: Act of New York legislature (Laws 1904, ch. 373) authorizing the conveyance of lands under Black Rock Harbor, etc. to the United States.

1905: Deed from State of New York to the United States of lands under Black Rock Harbor, etc.

1907: Notice from Secretary of War to International Bridge Company requiring it to reconstruct Black Rock Harbor span of bridge.

1909: Plans for reconstruction of Black Rock Harbor span showing provision for future roadway "not to be put in at present" and making no provision for access to Squaw Island, approved by Secretary of War.

1915: Act of New York Legislature, approved May 22nd. (Laws 1915 Ch. 666), required construction of roadway and pathway giving a passageway between Squaw Island and the main land, to be completed by January 1st., 1916, under penalty of \$50 per day for each day in default, and fixed rates for the use of said roadway and pathway.

1915: (December 6th.) Completion of Black Rock Harbor span of bridge according to plans reported to War Department by Engineer Officer in Charge.

1916: (January 11th.) Action commenced by State of New York against Bridge Company to recover penalty of \$50 per day for non-compliance with Chapter 666 of the Laws of 1915.

International Character of Niagara River.

The Niagara River, as an international boundary stream, has been regulated by treaties between the United States and Great Britain from the time our nation set up an independent government.

The Definitive Treaty of Peace concluded in 1783 between the United States and Great Britain traced the boundaries of the infant nation * *

* "through the middle of said lake (Lake Ontario) until it strikes the communication by water between that Lake and Lake Erie; *thence along the middle of said communication into Lake Erie.*" (Article II).

The Jay Treaty of '94 provided:

"It shall at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's Bay Company, only excepted), and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other." (Article III).

Doubts having arisen as to the effect upon the Jay Treaty of a subsequent treaty between the United States and certain Indian tribes requiring traders at Indian camps to be licensed by the United States, an explanatory article was added in 1796, reasserting the above provisions of Article III of the Jay Treaty.

The Treaty of Ghent of 1814 provided for the more definite designation of the International

boundary line along the border lakes and rivers, and commissioners appointed for this purpose made their report in 1822 declaring the true boundary intended by previous treaties to be "up the middle of said river (Niagara) to the Great Falls; thence up the Falls, through the point of the Horse Shoe, keeping to the west of Iris or Goat Island, and of the group of small islands at its head, and following the bends of the river so as to enter the strait between Navy and Grand Islands; thence along the middle of said strait to the head of Navy Island; thence to the west and south of and near to Grand and Beaver Islands, and to the west of Strawberry, *Squaw* and Bird Islands to Lake Erie."

In 1818, a Presidential proclamation was issued founded upon an agreement between the United States and Great Britain limiting the naval forces to be maintained by the respective governments on Lake Ontario and the Upper Lakes.

In 1850, Horse Shoe Reef, at the outlet of Lake Erie into the Niagara River, was ceded to the United States by Great Britain for the purpose of a lighthouse for the protection of navigation concentrating at Buffalo and that passing through the Welland Canal—"provided no fortification be erected on said reef", and was accepted by the United States on that condition.

In 1908, the United States and Great Britain, by treaty, conferred upon the existing International Waterways Commission, constituted by concurrent action of the United States and the Dominion of Canada, authority to ascertain and

re-establish accurately the location of the International boundary line through the Great Lakes and communicating waterways in accordance with the description of such line in the Definitive Treaty of Peace, with such deviations as might be required on account of the cession by Great Britain to the United States of a portion of Horse Shoe Reef for the lighthouse erected there.

In the same year was also concluded a "Treaty Concerning Fisheries in the United States and Canadian Waters," including specifically Niagara River and Lake Erie, and providing that the time, seasons and methods of fishing in said waters "shall be fixed by uniform and common international regulations, restrictions and provisions", and further—"The two governments engage to put into operation and to enforce by legislative and executive action * * * * the regulations, restrictions and provisions with appropriate penalties for all breaches thereof."

In the same year a "Treaty in Reference to Reciprocal Rights of the United States and Canada in the Matter of Conveyance of Prisoners, and Wrecking, and Salvage," was concluded, providing in substance, that any officer of the United States, or of any state, having in his custody a person charged with or convicted of certain offenses committed in the United States, might convey such person through any part of Canada to a place in the United States, subject to certain regulations, and containing reciprocal provisions in favor of Canada. This treaty further provided that vessels and wrecking appliances, either from

the United States or Canada, might save property and render assistance to any vessels wrecked or disabled in the waters or on the shores of the other country, in specified boundary waters, including the Niagara River.

The Treaty of 1910 Concerning Boundary Waters has been already considered under Point VI of our original brief (pp. 130-135).

It thus appears that the treaty power has been consistently exercised over the Niagara River since 1783, in relation to a wide diversity of subjects, including the location of the International boundary, the national defense, the protection and freedom of commerce and navigation, freedom of intercourse across the boundary, fisheries, the conveyance of prisoners, wrecking and salvage of vessels and the diversion of water for power purposes.

The words used by this court in sustaining the Migratory Bird Act, passed by Congress pursuant to the treaty between the United States and Great Britain, are applicable here:

“Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power.”

Missouri vs. Holland, U. S.; 40 Sup. Ct. Rep. 382.

The Franchise to Bridge the Niagara was Conferred by Congress.

Without repeating the argument on this point in our original brief, we desire to summarize our

contention and refer to recent decisions and legislation which emphasize the error of the New York Court of Appeals upon this point.

The franchise to bridge the Niagara was derived from the Acts passed by Congress and not from the legislation of New York State, because Congress alone was competent to grant such a franchise.

The New York Court of Appeals was misled by the form of the original Act of Congress in 1870, declaring "that any bridge and its appurtenances which shall be constructed * * * * in pursuance of" the New York legislation then in force "shall be a lawful structure", overlooking the fact that this very act imposed further conditions and requirements not found in the New York acts, and hence constituted an independent exercise of the plenary power of Congress over the subject matter. The Court of Appeals likewise completely ignored the Act of Congress of 1874, after the completion of the bridge, declaring the bridge *as constructed*, to be a lawful structure, though not in accordance with the New York legislation as now construed by the learned Court. The Court said in its opinion in this case:

"The charter thus obtained by defendant (from the State of New York) was confirmed by the Congress of the United States." (223 N. Y. 137, 141).

The error of the Court in thus treating as a mere confirmation or assent what was in fact the original grant of power from the only authority

capable of conferring it, is emphasized in the recent opinion of the same Court in *People v. Hudson River Connecting Railroad Corporation*, 228 N. Y. 203. In that case a New York corporation had sought and procured from the state a franchise to bridge the Hudson River at a point where both banks were within the State of New York. Subsequently, the corporation procured an Act of Congress authorizing the construction of such bridge, and plans for the same were approved by the Secretary of War. The Court of Appeals properly held that the State could not thereafter, by amendment, impose new or other regulations or requirements as to the construction of the bridge, because—"The State cannot make unlawful that which Congress under its plenary power has declared to be lawful". Obviously it became necessary for the Court to distinguish its decision in the case at bar, which it proceeded to do as follows:

"Upon the argument of this case, much emphasis has been laid upon the decision of *People v. International Bridge Company* (223 N. Y. 137). That case is clearly distinguishable from the present one in that Congress had not exercised its plenary power and authorized the construction of the International Bridge. The act of Congress passed in 1870 merely provided. "That any bridge and its appurtenances which shall be constructed across the Niagara River from the City of Buffalo, New York, to Canada, in pursuance of the provisions of an act of the

Legislature of the State of New York entitled ‘An Act to incorporate the International Bridge Company,’ * * * shall be lawful structures and shall be so held and taken and are hereby authorized to be constructed and maintained as provided by said act and such amendments thereto, anything in the laws of the United States to the contrary notwithstanding.”

This was merely a consent to the bridge as authorized by the state of New York in the charter and a waiver of objections which might be raised by the United States. *By this act nothing was granted to the bridge company by the United States. Its franchise depended wholly upon the New York act and that act, being an act of incorporation, was subject to amendment under the provisions of article VIII, section 1, of the New York State Constitution, provided such an amendment did not conflict with constitutional rights.* (People v. O’Brien, 111 N. Y., 1.)

Congress by the act referred to consented to any bridge constructed at this place under the charter of the International Bridge Company and declared any such bridge lawful and *bestowed the control of that bridge upon the legislature of the state of New York.* The consolidating act of New York made provision that the bridge “shall be as well for the passage of persons on foot and in carriages and otherwise as for the passage of trains.” This is mandatory, must be complied

with and insistence upon this charter requirement by the state does not violate any right of the corporation. The legislature, under its right to amend, amended the charter in 1915, and imposed a penalty upon the corporation for its failure after January 1, 1916 to build a roadway for vehicles and a pathway for pedestrians and this amendment was held valid. This was the decision of the International Bridge Case so far as is pertinent to the present appeal." (*Italics ours.*)

Passing the points already made in our original brief (pp. 24-32) that a company organized to construct and operate an international bridge between the United States and Canada is under no duty to construct and operate a local bridge between Buffalo and Squaw Island, and that the obligation to maintain a footway and roadway was derived from a Canadian act operative only in Canadian territory, which in the words of another court in a similar case, could not be brought across the river into the United States "even on a bridge," (*Evansville & H. Traction Co. vs. Henderson Bridge Co.*, 134 Fed. 973, 975), and such Canadian Act made no provision for a passage way between Buffalo and Squaw Island, the error in the reasoning of the Court of Appeals consists in their having paid too great regard to the form of the Act passed by Congress in 1870 in distinction to its essence. Because Congress, for convenience, referred to the New York legislation, which provided in detail for the construction of the bridge, and

adopted these requirements as its own, except where it specifically modified them, the Court assumed that Congress surrendered its jurisdiction over this bridge to the State of New York,—notwithstanding that by the same Act Congress expressly reserved to the Federal Court jurisdiction to prevent discrimination in the use of the bridge by railroads, and by the Act of 1874 expressly approved the modification in plans and legalized the bridge as constructed.

The Court here fell into fundamental error. *The question is not of the form of legislation, but of the power to legislate.*

Congress may not transfer its legislative powers to a state, but it may adopt a state law as its own when it is one that it would be competent for it to enact for itself, and give it the same validity as if provisions had been especially made by Congress (*Gibbons v. Ogden*, 9 Wheat. 1, 207, *In Re Rahrer*, 140 U. S. 545, 560; *Franklin v. United States*, 216 U. S. 559, 568). This is what Congress did in this case by the Act of 1870. But it expressly limited its adoption to "acts of said legislature now in force" (see *U. S. v. Paul*, 6 Pet. 141), thereby negativing any notion that it delegated its powers or bestowed the control of the bridge upon the Legislature of New York. Of course, such adoption did not extend to the act passed by the New York legislature in 1915, the constitutionality of which is now challenged. And when, in 1874, Congress relieved the Bridge Company of certain of the requirements of the New York Acts adopted by it in 1870 (as such acts are now construed

by the Court of Appeals), by approving the modification of plans consisting in the omission of the footway and roadway, and declaring the bridge a lawful structure *as constructed*, such requirements of the New York acts ceased to have any force. As this Court said of an act permitting State prohibition to apply to movements of liquor from one state into another—"the will which causes the prohibition to be applicable is that of Congress since the application of state prohibitions would cease the instant the act of Congress ceased to apply." (*Clark Distilling Co., v. Western Maryland Railway Co.* 242 U. S. 311.)

The bridging of Niagara River is a matter inherently international, properly subject to the Treaty power, and in the absence of the exercise of that power, committed exclusively to the discretion of Congress acting in conjunction with the Dominion (not the Provincial) Parliament of Canada.

"A question like this respecting the boundaries of nations is, it has been truly said, more a political than a legal question."

(Chief Justice Marshal in *Foster v. Neilson*, 2 Peters 253, 309).

Congress could not if it would, "bestow the control of the bridge upon the state of New York," as stated by the Court of Appeals. Congress is not permitted thus to delegate to the states powers entrusted to it by the Constitution for the very reason that the states were deemed incompetent properly to exercise them.

As to matters essentially international in character, and affecting the foreign relations of the government, such as the creation and use of a pathway between our soil and foreign territory, no action, or inaction, on the part of Congress could confer jurisdiction upon the State|

In the very recent case decided by this Court involving the power of Congress to delegate to the states the right to enact compensation laws in respect to the injury to persons in maritime employment, this Court held that the definite object of the grant of Congress of power to legislate concerning rights and liabilities within the maritime jurisdiction, was to commit direct control to the federal government; to releve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union. This court said:

“Concerning the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of congress. The subject was intrusted to it to be dealt with, according to its discretion—not for delegation to others. To say that because congress could have enacted a compensation act applicable to maritime injuries, it could authorize

the states to do so as they might desire, is false reasoning. Moreover, such a authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established—it would defeat the very purpose of the grant.
 * * * * Congress cannot transfer its legislative power to the states,—by nature this is non-delegable."

Knickerbocker Ice Company v. Stewart,
 252 U.S.—; U. S. Supreme Court Advance Opinions No. 15, (June 15, 1920)
 page 526.

If Congress cannot delegate to the states its legislative power over matters of international concern even when it has clearly expressed its will and intention so to do, *a fortiori*, no inference should be indulged of such surrender of jurisdiction where Congress has expressed no such intention.

Even where Congress has not acted, the state cannot impose conditions upon commercial intercourse with a foreign country nor exact a license fee as consent thereof, though such intercourse be carried on by ferriage, which is traditionally subject to state control.

City of Sault Ste. Marie v. International Transit Company, 234 U. S. 333.

That Congress by no means intended to relinquish to the State of New York its powers over

the bridging of the Niagara is illustrated by legislation recently passed by it creating a commission to inquire into the feasibility and expense of the construction of a public bridge from Buffalo to Canada and to devise a plan for the construction of such bridge and the manner of financing its construction. (Act of January 30, 1920, Chapter 128).

In like manner Congress recently gave its solemn consent to compacts between the States of New York and New Jersey for the construction of an interstate tunnel under the Hudson River between Jersey City and New York, which was already authorized and provided for by legislation in both states. In so doing, Congress expressly reserved the right to alter, amend or repeal said consent. (Act of July 11, 1919, Ch. 11, Stats. 66th. Congress 199, page 158).

Even where the commercee is interstate and not international, the state is without power to compel a railroad car-ferry, forming a link in an interstate railroad line, to accept a license requiring it to carry on a local ferriage business across a stream which is a boundary between two states because this would be a direct burden on interstate commerce.

St. Clair County v. Interstate Transfer Company, 192 U. S. 454-469-470.

The requirement that an interstate railroad car ferry should operate a local passenger ferry service, presents a very close analogy to the requirement that an international railroad bridge shall

construct upon the same piers as the existing bridge and operate a local passenger bridge. The present case is the stronger in two respects, (a) the commerce affected is international instead of interstate, and hence involves political considerations which are not involved in interstate commerce, as illustrated by the fact that such commerce across and along the Niagara River has been the subject of treaty between Great Britain and the United States. (Jay Treaty of 1794, Article 3; Treaty of 1908 in Reference to Reciprocal Rights in the Matter of Conveyance of Prisoners, etc.; Treaty of 1910. Concerning Boundary Waters). (b) The International Bridge was constructed under a direct franchise from Congress, whereas the interstate car ferry involved in the above case was not operated under such a franchise.

The Franchise to Bridge the Niagara being Derived Solely from Congress, Cannot be Regulated, Impaired or Interfered with by the State of New York.

It is immaterial that the Bridge Company was organized, and later consolidated with the Canadian company, pursuant to acts of the New York Legislature concurrently with acts of the Dominion of Canada, and that the New York act assumed to grant a franchise to bridge the Niagara, for such grant was without power. In discussing the power of the State of California to tax federal franchises conferred upon a California corporation, this Court said:

"If, therefore, the Central Pacific Railroad Company is not a federal corporation, its most important franchises, including that of constructing a railroad from the Pacific Ocean to Ogden City, were conferred upon it by Congress.

It cannot at the present day be doubted that Congress under the power to regulate commerce among the several States, as well as to provide for postal accomodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjunets of commerce. * * * Of course the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, *and employing the agency of state as well as federal corporations.* See Pacific Railroad Removal Case, 115 U. S. 1, 14, 18.

Assuming, then, that the Central Pacific Railroad has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? * * * * In our judgment, it cannot." * * * * *

"Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty."

(*Italics ours*).

California vs. Pacific R. R. Co., 127 U. S.

1, 39, quoted with approval in *Wilson vs. Shaw*, 204 U. S. 24, 33.

United States vs. Stanford, 161 U. S. 412, 432.

Southern Pacific R. R. Co. vs. United States, 183 U. S. 519, 527.

Where the United States has declared an International Bridge as constructed to be a lawful structure, a mandate from the state compelling changes in, or additions to the structure so approved, is surely, in the words of this Court, not only derogatory to the dignity, but subversive of the powers and repugnant to the paramount sovereignty of the government.

The Constitution of the United States makes the Federal Government the supreme and only master over all waters like the Niagara River that are international boundaries, and necessarily over ferries across them, or bridges over them, and it cannot be possible that the legislature of New York, or Texas, or any other state, can lawfully subject a bridge company to an ever increasing fine if it does not also obey the orders, or legislative acts of the state, imposing heavy additional burdens upon its own terms as to the same bridge. The war powers of the Federal Government might have to be exercised upon such an International Bridge, and surely its owner could not prevent such exercise by pleading that it had constructed or added to such bridge by command of a state at great expense, or even loss, for the benefit of the people of some part of such state. It is of supreme importance to the Federal Government, as well as to the International Bridge Company, that the paramount power of the Federal Government should not be impaired in such cases by decisions like that of the New York Court of Appeals now here for review. The situation is one that requires not merely *paramount*, but *ex-*

clusive control by Congress and the treaty making power.

Respectfully submitted,

MOOT, SPRAGUE, BROWNEll & MARCY,

Attorneys for Plaintiff-in>Error

Office and P. O. Address,
302 Erie County Bank Bldg.,
Buffalo, N. Y.

ADELBERT MOOT,

HENRY W. SPRAGUE,

WILLIAM L. MARCY and

HELEN Z. M. RODGERS,

of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1919

No. [REDACTED] 46

INTERNATIONAL BRIDGE COMPANY,
PLAINTIFF IN ERROR,

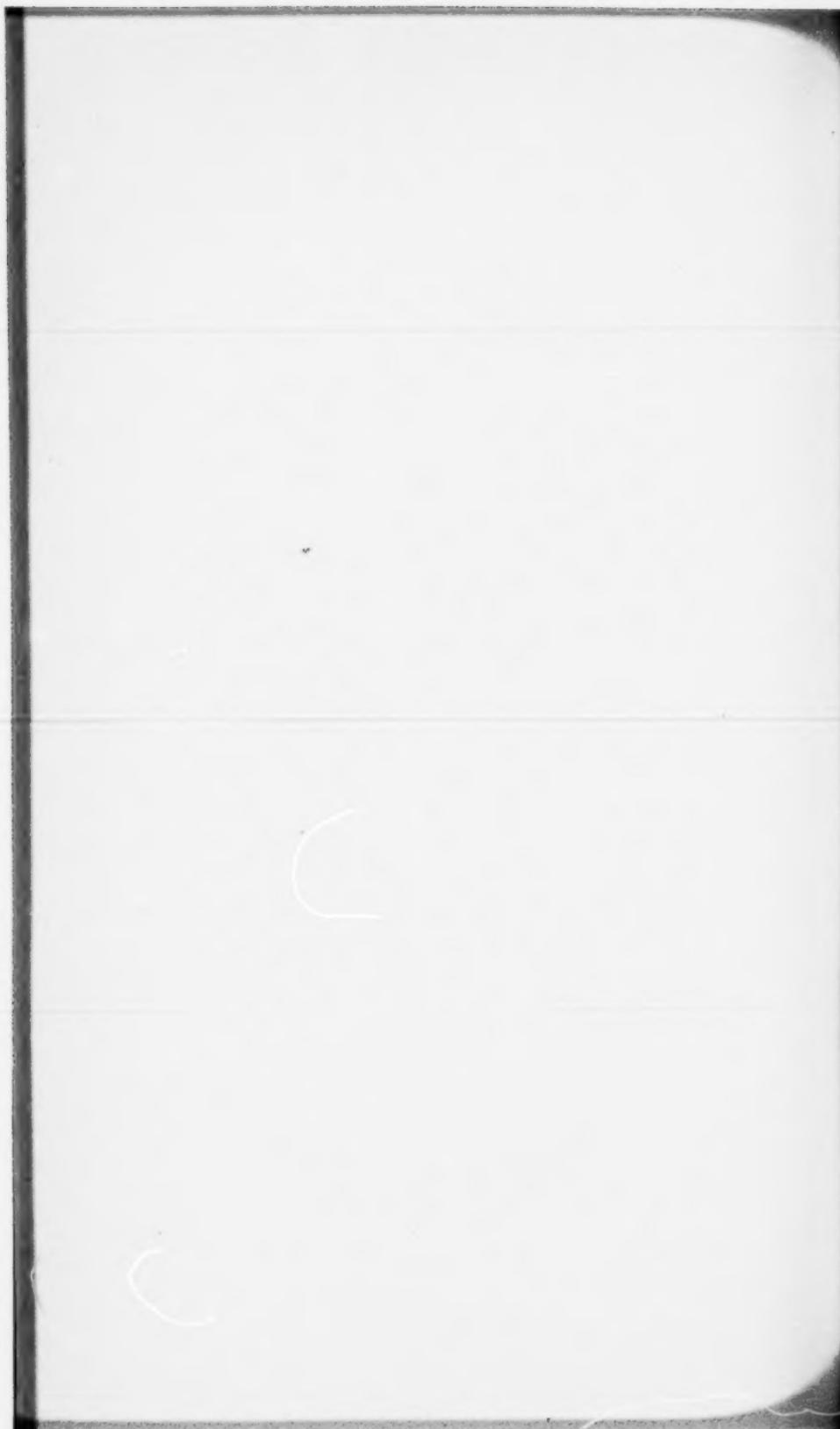
vs.

THE PEOPLE OF THE STATE OF
NEW YORK,
DEFENDANT IN ERROR.

Exhibits for Plaintiff in Error

MOOT, SPRAGUE, BROWNELL & MARCY, . .
Attorneys for Plaintiff in Error.

ADELBERT Moot,
Of Counsel.



DEFENDANT'S EXHIBIT 7

THIS INDENTURE, Made the 18th day of May, in the year 1871, between the "Niagara River Hydraulic Company," a corporation existing by virtue of the laws of the State of New York, party of the first part, and the "International Bridge Company," a corporation existing by virtue of the laws of the State of New York, and of the Dominion of Canada, party of the second part,

WITNESSETH: That the said party of the first part in consideration of the sum of \$1000.00 lawful money of the United States of America, to it duly paid, has bargained and sold, and by these presents does bargain, sell, grant and convey, to the said party of the second part, and its successor or successors and assigns forever, all that certain piece or parcel of land situate, lying and being in the City of Buffalo, County of Erie and State of New York, and being composed of a part of SQUAW ISLAND, in the Niagara River. The said piece or parcel of land extends across the said Island, from the Niagara River easterly to Black Rock Harbor, and embraces $68\frac{1}{2}$ feet on the right or south side and $51\frac{1}{2}$ feet on the left or north side of a certain centre line as the same is located; the said central line is described as follows: that is to say, commencing at a point on the west side of the said Squaw Island, at the low water line of the Niagara River, where it is intersected by the centre line of the International Bridge, as the same is located and established; thence in an east-

erly direction on a tangent, said tangent being a continuation or extension of the said centre line of the International Bridge, for a distance of 352 feet more or less; thence in an easterly and northerly direction, on a curve, described with a radius of 1910 feet, and turning to the left for a distance of 858½ feet measured along said curve; thence in a northeasterly direction on a tangent to the curve above described for a distance of 102 feet more or less, to Black Rock Harbor, containing Three acres and 61 $\frac{1}{100}$ of an acre be the same more or less. With the appurtenances and all the estate, right, title and interests of the said party of the first part in and to the same and every part thereof.

It is mutually understood and agreed by and between the parties to this indenture, signified by its execution and acceptance, that the said party of the first part and its successors and assigns, shall have the right in common with the public at large, to use the bridge to be erected and maintained by the party of the second part, upon the premises above described, and across the water at either end of the main shores of the Niagara River, upon paying therefor the tolls and charges allowed by law. And further that all reasonable and proper rail and other connection may be made with such bridge and with the railroad to be laid thereon, by means of proper switches as shall be required by the party of the first part, its successors or assigns, for the improvement of Squaw Island or any part thereof, and the ingress and egress required thereby, for the business which

may be transacted upon the same; it being expressly understood, however, that such connections shall be made at the sole expense of the party desiring the same, and without expense to the party of the second part, its successors or assigns, and in such mode and manner as shall not interfere with the regular business of said bridge, and without damage thereto, or to the railroad laid upon the same, or its appurtenances. And the said party of the first part does hereby covenant and agree, that at the delivery hereof, it is the lawful owner of the premises above granted, and seized thereof by a good and indefeasible estate, in fee simple, clear of encumbrances, and that it will warrant and defend the above granted premises in the quiet and peaceable possession of the party of the second part, its successors and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto on the day and year first above written, set its corporate seal in execution hereof, by virtue of a resolution of its Board of Directors, and caused the same to be attested by the signatures of its President and Secretary.

(Signed)

The Niagara River Hydraulic Company,

(L.S.) Samuel L. M. Barlow, President.

Attest:

L. Johnston, Secretary.

[\$100 Rev. Stamp Cancelled.]

City and County of New York, ss:

On this 19th day of May in the year 1871 before me personally appeared Lawrence Johnston Secretary of the Niagara River Hydraulic Company with whom I am personally acquainted who being by me duly sworn said that he resided in the City of New York; that he was the Secretary of the Niagara River Hydraulic Company, that he knew the corporate Seal of the said Company; that the Seal affixed to the foregoing Instrument was such Corporate Seal that it was so affixed by order of the Board of Directors of the said Company and that he signed his name thereto by the like order as the Secretary of the Company. And the said Lawrence Johnston further said that he was acquainted with Samuel L. M. Barlow and knew him to be the President of said Company, that the signature of the said Samuel L. M. Barlow subscribed to the said Instrument was in the genuine handwriting of the said Samuel L. M. Barlow and was thereto subscribed by the like order of the said Board of Directors and in the presence of him the said Lawrence Johnston.

In Witness Whereof I have hereunto set my hand and affixed my official Seal the said 19th day of May in the year 1871.

(L. S.)

William A. Dumphy,

Notary Public
N. Y. County

State of New York
City and County of New York } ss.

I, Charles E. Loen, Clerk of the City and County of New York and also Clerk of the Supreme Court for the said City and County; the same being a Court of Record Do Hereby certify that William A. Dumphy whose name is subscribed to the Certificate of the proof or acknowledgment of the annexed Instrument and thereon written, was at the time of taking such proof or acknowledgment a Notary Public in and for the City and County of New York, dwelling in the said City commissioned and sworn and duly authorized to take the same. And further that I am well acquainted with the handwriting of such Notary and verily believe that the signature to the said Certificate of proof or acknowledgment is genuine.

In Testimony Whereof I have hereunto set my hand and affixed the Seal of the said Court and County the 29th day of May 1871.

(L. S.) Charles E. Loen Clerk

Recorded & Ex'd. June 6th 1871
at 10 $\frac{1}{2}$ O'clock A. M. 5et C'd.

J. H. Fisher, Clerk.

State of New York }
County of Erie } ss.

I, JOHN H. MEAHL, Clerk of the County of Erie,
and also Clerk of the Supreme and County Courts
for said County, the same being Courts of Record
do hereby certify that I have compared the an-
nexed copy of Deed with the original Record
thereof, entered and on file in the office of the
Clerk of Erie County, and that the same is a cor-
rect transcript therefrom and of the whole of said
original.

[Seal]

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed the seal of said County and
Courts at Buffalo, this 16th day of June, 1916.

No. 1260

John H. Meahl,
Clerk.

[10c rev. stamp cancelled]

DEFENDANT'S EXHIBIT 8

THIS INDENTURE, made the sixth day of August, in the year of our Lord One Thousand Eight Hundred and Seventy-Four, between THE NIAGARA RIVER HYDRAULIC COMPANY, a corporation, existing by virtue of the laws of the State of New York, party of the first part, and THE INTERNATIONAL BRIDGE COMPANY, a corporation, existing by virtue of the laws of the State of New York and the Dominion of Canada, party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the sum of Five Thousand Dollars in gold and silver coin, lawful money of the United States of America to it duly paid, has sold, and by these presents does sell, bargain, grant and convey to the said party of the second part, its successor or successors and assigns, ALL those certain pieces or parcels of land, situate, lying and being in the City of Buffalo, County of Erie and State of New York, being parts of Squaw Island in the Niagara River, the said pieces or parcels of land so sold and hereby intended to be conveyed (being two strips each sixty feet in width extending across said Island from low water mark in the Niagara River easterly to the Black Rock Harbor and are situated respectively on the north and south sides of the right of way, or lands originally purchased for and by the party of the second part, of and from the party of the first part, as described and conveyed in

and by a certain deed dated the 18th day of May in the year 1871, and recorded in the office of the Clerk of Erie County in liber 293 of deeds at page 395, June 6, 1871; said northerly parcel or strip commencing at the intersection of the northerly boundary of said right of way with the low water line of Niagara River, which said northerly boundary is distant 51 feet and 6 inches from the centre line of said International Bridge, and extending easterly along said northerly boundary on a tangent and curve and parallel to the centre line of the right of way so conveyed as aforesaid 1290 feet more or less, to Black Rock Harbor, and extending northerly so as to take in a strip of land of a uniform width of 60 feet, and containing One and 87 $\frac{1}{100}$ acres be the same more or less; and said southerly parcel or strip commencing at the intersection of the southerly boundary of said right of way with the low water line of Niagara River, with said southerly boundary is distant 68 feet and 6 inches from the centre line of said International Bridge, and extending easterly along said southerly boundary on a tangent and a curve, and parallel to the centre line of the right of way so conveyed as aforesaid, 1335 feet more or less, to Black Rock Harbor, and extending southerly so as to take in a strip of land of a uniform width of 60 feet, and containing one acre and 85-100 of an acre be the same more or less;

Together with all and singular the appurtenances and all of the estate, right, title and interest, property and possession of the said party of the first part.

It is mutually understood and agreed by and between the respective parties to this indenture, signified by its execution and acceptance, that the party of the first part and its successors and assigns, shall have the right, in common with the public at large, to use the bridge and railroad tracks erected and constructed, or to be erected and constructed and maintained by the party of the second part, upon the premises above described, and across the waters at either end of the main shores of the Niagara River, upon paying therefor the tolls and charges allowed by law; and further, that all reasonable and proper rail and other connections may be made with such bridge, and with the railroads to be laid thereon, by means of proper switches and appurtenances, as shall be required by the party of the first part, its successors or assigns, for the use and improvement of Squaw Island, or any part thereof, and ingress and egress required thereby, and for the business which may be transacted upon the same, and also that a suitable passage may be opened, constructed and maintained under said bridge, and the railroads upon or connected therewith, so as to connect the northerly and southerly parts of Squaw Island, the said passage to be made upon plans to be approved by the party of the second part, it being expressly understood, however, that such connections and passage shall be made at the sole cost of the party designing the same, and without expense to the party of the second part, its successors or assigns, and in such mode and manner as shall not interfere with the regular business

of said bridge, and without damage thereto or its appurtenances.

And the said party of the first part does hereby covenant, bargain and agree, that at the delivery hereof, it is the lawful owner of the premises above granted, and seized thereof by a good and indefeasible estate in fee simple, clear of encumbrances and that it will warrant and defend the above granted premises in the quiet and peaceable possession of the party of the second part, its successor or successors and assigns forever.

IN WITNESS WHEREOF, the said party of the first part has hereunto on the day and year first above written, set its corporate seal in execution hereof, by virtue of a resolution of its Board of Directors, and caused the same to be attested by the signatures of its President and Secretary.

(Signed)

The Niagara River Hydraulic Company,

(L S) Samuel L. M. Barlow, President.

In the Presence of

Attest

William H. Taylor, Secretary.

State of New York }
City & County of New York } ss.

On this twenty first day of August one thousand eight hundred and seventy four before me personally came William H. Taylor, Secretary of the Niagara River Hydraulic Company to me known

who being by me duly sworn did depose and say that he resided at Elizabeth in the State of New Jersey that he was the Secretary of the said Company that he knew the corporate seal of the said company that the seal affixed to the foregoing deed was such corporate seal that it was so affixed by order of the Board of Directors of said company and that he signed his name thereto by the like order as secretary of said Company. And the said William H. Taylor further said that he knew Samuel L. M. Barlow the President of the said Company and that the signature of the said Samuel L. M. Barlow subscrived to the said deed was in the genuine handwriting of the said Samuel L. M. Barlow and was thereto subscrived in the presence of him the said William H. Taylor by like order of the said board of Directors.

S. D. Thomas,
(L. S.) Notary Public Kings County.

State of New York }
County of Kings } ss.

I, George G. Herman Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said county (said Court being a Court of Record) do hereby Certify that S. D. Thomas whose name is subscrived to the certificate of proof or acknowledgement of the annexed instrument and thereon written was at the time of taking such proof or acknowledgement a Notary Public of the state of New York in and for the said County of Kings dwelling in said County commissioned and sworn and duly

authorized to take the same and further that I am well acquainted with the handwriting of such Notary and verily believe the signature to said Certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said County and Court this 21st day of August 1874.

(L. S.) George G. Herman Clerk

Recorded and Examined
August 27, 1874 at 4 $\frac{1}{4}$ o'clock P. M.

G. L. Remington
Clerk.

State of New York }
County of Erie } ss.

I, JOHN H. MEAHL, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record do hereby certify that I have compared the annexed copy of Deed with the original Record thereof, entered and on file in the office of the Clerk of Erie County, and that the same is a correct transcript therefrom and of the whole of said original.

[Seal]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said County and Courts at Buffalo, this 16th day of June, 1916.

No. 1261

John H. Meahl,
Clerk

[10¢ rev. stamp cancelled]

DEC 4 1919

JAMES D. MAHER,
CLERK

Brief of Defendant in Error

Supreme Court of the United States

No. [REDACTED] 46

INTERNATIONAL BRIDGE COMPANY

Plaintiff in error

against

THE PEOPLE OF THE STATE OF NEW YORK

Defendants in error

CHARLES D. NEWTON

ATTORNEY GENERAL OF NEW YORK
FOR DEFENDANTS IN ERROR

OF COUNSEL:

RALPH A. KELLOGG
JAMES S. Y. IVINS
E. C. AIKEN



INDEX

	PAGE
STATEMENT	1
FACTS AND CIRCUMSTANCES	5
Right to build roadway granted	5
Same still exists	7
Authority from U. S. for same	9
Has not been revoked	11
Right to amend charter reserved	11
In New York territory	12
Rights granted to owners of Squaw Island	13
Probable cost insignificant	15
Reasonable return on investment	18
Nature of Black Rock Harbor	21
Roadway a public necessity	23
Defendant failed to comply with statute	29
ANALYSIS OF LEGAL CONTENTIONS	
OF PLAINTIFF-IN-ERROR	29
POSITION OF DEFENDANT-IN-ERROR	35
POINTS:	
I. The statute does not impair the obligation of any contract	38
II. The statute is a reasonable exercise of police power and does not contravene XIV Amendment	48
III. The statute does not contravene the foreign and interstate commerce clause of the Constitution	66
IV. Points of Plaintiff-in-error considered	79
CONCLUSION: The judgment should be affirmed	86

TABLE OF CASES

	PAGE
Atlantic Coast Line v. Georgia, 234 U. S. 280.	49
Atlantic Coast Line v. Goldboro, 232 U. S. 548	57
Atlantic Coast Line v. North Carolina Corp. Com., 206 U. S. 1.....	43, 49, 54, 57
Bacon v. Walker, 204 U. S. 311.....	48
Baltimore & Ohio R. Co. v. I. C. C., 221 U. S. 612	49
Calder v. Michigan, 218 U. S. 591.....	46
Canada Atlantic Tr. Co. v. Chicago, 210 Fed. 7	49, 70, 71
Century Encyclopedia, Vol. X.— Tit. Illinois & Indiana	77
C., B. & Q. R. R. Co. v. Drainage Com., 200 U. S. 561	48, 51, 57
C., M. & St. Paul R. Co. v. Minneapolis, 232 U. S. 430	49, 52, 57
Chesapeake & Ohio Ry. v. Public Service Com., 242 U. S. 603.....	44, 49
Clark v. Nash, 198 U. S. 361.....	48, 51
Close v. Glenwood Cemetery, 107 U. S. 466..	
Cummings v. Chicago, 188 U. S. 410..	49, 69, 71
	72, 73, 86
Dartmouth College Case, 4 Wheat. 518.....	38
Erie R. R. Co. v. Williams, 233 U. S. 700..	46,
	48, 54, 57
Escanaba Co. v. Chicago, 107 U. S. 678....	69, 70
Fair Haven & W. R. Co. v. New Haven, 203 U. S. 379	46
Holyoke Water Co. v. Lyman, 15 Wall. 500..	46
Hamilton Gas Light & Coke Co. v. Hamilton, 146 U. S. 258.....	46

	PAGE
Jefferson College v. Washington College , 13	13
Wall. 190	46
Lake Shore & M. S. Ry. Co. v. Clough , 242	46
U. S. 375.....	49
Lake Shore & M. S. Ry. Co. v. Ohio , 165 U. S.	75
365	69,
Laws of 1915 (N. Y.) ch. 666 quoted.	4
Louisville Water Co. v. Clark , 143 U. S. 1...	46
Miller v. New York , 15 Wall. 478.....	46
Minnesota Rate Cases , 230 U. S. 352	49,
	50,
	63,
	72,
Missouri Pacific R. Co. v. Kansas , 216 U. S.	82
262	44,
	49,
	50,
	58
Missouri Pacific R. Co. v. Omaha , 235 U. S.	57
121	48,
	52,
	57
Mt. Vernon C. Co. v. A. P. Co. , 240 U. S. 30	53
Munn v. Illinois , 94 U. S. 113.....	53
Noble State Bank v. Haskell , 219 U. S.	57
104	46,
	48,
	50,
	57
N. Y. & N. E. R. R. C*. v. Bristol , 157 U. S.	49
536	46,
	49
Offield v. N. Y., N. H. & H. R. Co. , 203 U. S.	48
372	48
Ramapo Water Co. v. City of New York , 236	48
U. S. 579	46
Shields v. Ohio , 95 U. S. 319.....	49
Sioux City S. R. Co. v. Sioux City , 138 U. S.	46
98	46
Strickley v. Highland Boy Mining Co. , 200	48
U. S. 527	48
West Chicago S. R. Co. v. Illinois , 201 U. S.	51
506	49,
	57,
	70,
	71
Wilcox v. Cons. Gas Co. , 212 U. S. 19.....	55
Wisconsin, etc., R. Co. v. Jacobson , 179 U. S.	57
287	49,
	53,
	57



SUPREME COURT OF THE UNITED STATES

INTERNATIONAL BRIDGE COMPANY,
Plaintiff in Error,
against
THE PEOPLE OF THE STATE OF
NEW YORK,
Defendants in Error.

BRIEF FOR DEFENDANT IN ERROR STATEMENT

Writ of Error to the Supreme Court of the State of New York to review a judgment entered in Albany County Clerk's Office on the 23rd day of March, 1918, on remittitur from the Court of Appeals, affirming the judgment of affirmance entered in Albany County Clerk's Office on August 2, 1917, on an order of the Appellate Division, Third Department, affirming with costs a judgment of the Supreme Court, entered in said Clerk's Office, November 20, 1916, in favor of plaintiff, The People of the State of New York, and against defendant International Bridge Company, for seven hundred forty-four and forty-two hundredths dollars (\$774.42) (R. pp. 204-208 also 215-216). The judgment of the trial court was entered upon the decision of Mr.

Justice Rudd, a jury trial having been waived, (R. pp. 68, 69). No opinion was written by the trial court nor in the Appellate Division. The opinion of the Court of Appeals is printed at pages 197 to 202 of the record and is reported at 223 N. Y. 137. The decisions of both the Appellate Division and the Court of Appeals were unanimous.

The defendant in error sued to recover of the plaintiff in error the penalty of fifty dollars (\$50.00) per day imposed by Chapter 666 of the Laws of 1915, for the failure of plaintiff in error up to January 11, 1916 to construct a roadway for vehicles and a pathway for pedestrians upon defendant's bridge across Black Rock Harbor from the mainland to Squaw Island, both in the City of Buffalo and State of New York, as required by that statute.

The plaintiff-in-error admits in its answer (record pp. 12-23) that it wholly failed, neglected and refused to comply with the provisions of this statute and that it is liable for the penalty for which the judgment appealed from was granted unless Chapter 666 of the Laws of 1916 contravenes the obligation of contract clause (Art. 1, § 10, Subd. 1), the deprivation of property clause (first section, 14th amend.), the foreign and interstate commerce clause (Art. 1, § 8, Subd. 3) of the United States Constitution, or the deprivation of property clause (Art. 1, § 6) of the Constitution of the State of New York, as it alleges.

While the action takes the form of one to recover penalties, the real issue is the right of the State to compel the plaintiff-in-error to build the roadway in question. The penalties continue

to accrue and already amount to about seventy thousand dollars (\$70,000.00) to be recovered in a subsequent action. Obviously the plaintiff-in-error will build the roadway if legally subject to these penalties on failure to do so.

There are no exceptions to the admission or exclusion of evidence which plaintiff-in-error deemed of sufficient importance to bring to the attention of the courts below, or upon which any serious discussion, here, could be based.

While a vast amount of statutes, maps and other documentary evidence was introduced, there was practically no conflict of evidence or real dispute as to the essential facts upon which the issues of law depend. Of plaintiff-in-error's twenty-six requests to find facts (R. pp. 26-46), all were found by the trial court except five, i. e. Nos. VIII, XXII, XXIV, XXVI and XXVII and all with these exceptions and the last sentence of request No. XII, which is wholly immaterial, were incorporated in the decision (R. pp. 51-67) in the exact language requested. Of the twenty-four findings of fact in the decision, all except Nos. VIII, XXI, XXII, XXIII and XXIV are in the language of plaintiff-in-error's request to find. There was and is no possible question that each refusal to find facts was based upon either an absence of sufficient evidence to support it or ample evidence justifying a contrary conclusion or that each finding of fact not requested by defendant was based upon ample evidence to sustain it.

The Conclusions of Law (R. pp. 65-67) are, briefly stated, that the Statute in question, Chapter 666 of the Laws of 1915, is within the State's

police power and is a proper, reasonable, and valid exercise thereof and does not contravene any of the provisions above mentioned of the Federal or State Constitutions and that therefore the plaintiff is entitled to judgment for the penalties therein provided with costs.

Chapter 666 of the Laws of 1915 is here quoted in full for convenient reference:

"The People of the State of New York, represented in Senate and Assembly, do enact as follows:

"Section 1. Chapter seven hundred and fifty-three of the laws of eighteen hundred and fifty-seven, entitled 'An act to incorporate the International Bridge Company,' is hereby amended by adding thereto a new section after section fifteen, to be known as section fifteen-a, and to read as follows:

"§ 15-a. A roadway for vehicles and a pathway for pedestrians shall be constructed upon the draw across Black Rock Harbor giving a passageway over said draw between Squaw Island and the mainland of New York State, such roadway and footpath to be completed and ready for use by January first, nineteen hundred and sixteen, and in case of the failure of said corporation or its successor in interest so to complete the same on or before said date, said corporation or its successors in interest shall be liable to a penalty of fifty dollars per day for each day that it shall be in default. Such penalty may be sued for and collected by the attorney-general in any court of competent jurisdiction.

"Upon the completion of said roadway and pathway, said company may erect toll gates and fix rates of toll for the use thereof, but no greater tolls than the following shall be charged for the use of the said roadway or

pathway; for every foot passenger, three cents for each passenger one way or five cents for round trip; for every horse and rider, five cents; for every carriage, except as hereinafter expressly provided, with horse or horses and occupants, ten cents; for every automobile, except as hereinafter expressly provided, and occupants, ten cents; for loaded wagons and loaded automobile trucks for commercial purposes, two cents for each ton of material carried, and no charge for empty wagons or automobile trucks used for commercial purposes, or for the drivers thereof.

"§ 2. This act shall take effect immediately."

THE FACTS AND CIRCUMSTANCES UNDER WHICH THE STATUTE OF 1915 WAS ENACTED.

I

BY THE STATUTE OF THIS STATE, CHAPTER 753 OF 1857, WHICH INCORPORATED IT, THE PLAINTIFF-IN-ERROR WAS GRANTED AND HAS EVER SINCE POSSESSED THE RIGHT AND FRANCHISE TO BUILD AND OPERATE A BRIDGE ACROSS THE NIAGARA RIVER FROM BUFFALO TO FORT ERIE, CANADA, "AS WELL FOR THE PASSAGE OF PERSONS ON FOOT AND IN CARRIAGES AND OTHERWISE AS FOR THE PASSAGE OF RAILROAD TRAINS."

Finding of Fact III, (R. pp. 53-54).
Chapter 753, Laws of 1857.

That the legislature contemplated the plaintiff-in-error would provide a pathway for pedestrians and a roadway for vehicles upon the bridge which

it was chartered and authorized to construct, if it built any at all, is very clearly expressed in the following words quoted from that act:

"§ 15. Said bridge may be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains."

"§ 16. Whenever the said bridge shall be complete for the passage of ordinary teams and carriages the said company may * * * fix rates of toll * * * but no greater toll than the following shall be charged, viz.: for every foot passenger * * * twenty-five cents; for every horse and single carriage sixty cents; for each double carriage and two horses, one dollar; for sheep * * * one and one-half cents per head; for swine two cents each; for neat cattle six cents per head; for each horse in droves or in cars, twelve and one-half cents."

"§ 17. Whenever said bridge is so complete as to admit of the passage of railroad trains, the said company may make such rules in relation to * * * the compensation to be paid therefor, etc."

"§ 18. If any person shall force * * * any gate or guard of said bridge * * * without having paid the established toll * * * such person shall forfeit, etc."

The extreme particularity with which rates of toll are provided for pedestrians, vehicles and animals down to a distinction between sheep and swine, is significant. The whole act breathes the idea that a bridge for railroad trains only was not in the mind of the legislature at all.

The fact that the word *may* instead of the word *must* is used in the first sentence quoted, has no

significance whatever. The whole act was necessarily permissive in form—the legislature obviously could not *require* the corporation to be formed, or the private citizens selected as a commission to organize it, to build any bridge at all. But if the franchise was accepted by building any bridge, then the word *may* was automatically changed to *must* as to each privilege conferred.

This was not a grant to an existing railroad corporation to build a bridge as a link in its line but the creation of a commission to organize an independent corporation to build this bridge, required by the public, as a separate and distinct undertaking. The fact that the Grand Trunk Railway subsequently acquired and now owns all the stock of the corporation so formed (folios 350-351; Exh. R. & R. I.) does not change the legal situation in the least, though the practical result is to destroy as far as the Grand Trunk Railroad can, the original object, purpose and character of appellant.

Finding of Fact (R. pp. 51-53).
Statute Chapter 753, Laws of 1857.

II

THE RIGHT, PRIVILEGE AND DUTY THUS CONFERRED AND IMPOSED TO BUILD A PATHWAY FOR PEDESTRIANS AND A ROADWAY FOR VEHICLES WAS CONTINUED UNIMPAIRED THROUGH ALL SUBSEQUENT LEGISLATION.

As suggested in the Act of 1857, the Canadian Government then enacted a similar statute (Chapter 227 of 20th Victoria), incorporating a com-

pany of the same name and purposes. This Act among other things, provided:

"XIV. The said bridge *shall* be as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains."

Finding of Fact IV and I (R. pp. 54; 51-52).

By Canadian and New York statutes, the two corporations were then consolidated as one. The New York statute (Chapter 550 of 1869) effecting this consolidation, provides:

"Section 6. * * * the several corporations, parties thereto, shall be deemed and taken to be consolidated and to form one corporation * * * possessing all the rights, privileges and franchises, and subject to all the disabilities and duties of each of such corporations so consolidated."

Finding No. II (folios 200-202).

The Congress of the United States by Chapter 176 of the Acts of 1870, confirmed the franchise so granted in these words:

"That any bridge and its appurtenances which shall be constructed across the Niagara River from the City of Buffalo, N. Y., to Canada in pursuance of the provisions of an Act of the legislature of the State of New York, entitled 'An Act to incorporate the International Bridge Company,' passed April 17th 1857 (Chap. 753 above) or of any act or acts of said legislature now in force amending the same * * * are hereby authorized to be constructed and maintained as provided by said act and such amendments thereto."

Finding V (R. pp. 54-55).

III

AT ALL TIMES SINCE ITS BRIDGE WAS FIRST PLANNED BY IT, ABOUT 1870, THE PLAINTIFF-IN-ERROR HAS POSSESSED AND ENJOYED THE FULL AND COMPLETE PERMISSION AND AUTHORITY OF THE FEDERAL GOVERNMENT TO CONSTRUCT THEREON A PATHWAY FOR PEDESTRIANS AND A ROADWAY FOR VEHICLES.

1. As already pointed out, Congress by Chapter 176 of the Act of 1870 in the passage above quoted therefrom, authorized the construction and maintenance by plaintiff-in-error of the bridge provided for in the original New York Act of 1857 and any amendments thereof then in force and that Act of 1857 and all amendments thereof authorize plaintiff-in-error to construct such bridge "*as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains.*"

We believe the original plans filed with and approved by the Secretary of War showed wings carrying a pathway and roadway for pedestrians and vehicles — and that seems to be confirmed by the finding that it was constructed as a railway bridge only and that the modification of the plans was subsequently approved.

Finding No. VI (R. pp. 55-56).

No specific finding to that effect appears in the record. But however that may be, it is obvious that the general authority to build such roadways as provided in the New York Act was granted by the Act of Congress of 1870 and getting plans

showing such pathways and roadways approved by the Secretary of War was a mere detail within the unquestioned rights of plaintiff-in-error, if it chose to exercise them.

2. Upon rebuilding the bridge in 1899-1901, the plaintiff-in-error filed and the Secretary of War duly approved, in pursuance of full authority from Congress, plans therefor which "*showed wings to be constructed on either side of the bridge for the accommodation of roadways and footpaths.*"

Finding X (R. pp. 57-58).

3. Upon being required by the Secretary of War in 1907 to remove the old and erect the present draw bridge across Black Rock Harbor from the mainland of Buffalo to Squaw Island—the very structure which is the subject of the Act, Chapter 666 of 1915 upon which this action was brought—the plaintiff-in-error filed and the Secretary of War with full authority approved plans therefor showing "*wings on each side of said proposed bridge for the purpose of accommodating roadways and footpaths.*"

Finding XIV (R. p. 61).
Defendant's Ex. 25.

IV

NO REVOCATION OF THE CONSENT, APPROVAL AND AUTHORITY OF THE FEDERAL GOVERNMENT IS FOUND OR SUGGESTED.

On the contrary, it is found that plaintiff-in-error in building the present draw across Black Rock Harbor was careful to design and construct it so that pathways and roadways could be hung thereon without interfering with the use of the structure for railroad purposes and to retain the right to make those additions at any time in the future by the following notation upon the plans so submitted and approved.

"Roadways shown in dotted lines not to be put in at present but provision is made in the design of the bridge for their future construction."

Findings XIV and XV (R. pp. 61-62).

V

THE RIGHT TO ALTER, AMEND OR REPEAL WAS EXPRESSLY RESERVED TO THE STATE LEGISLATURE IN THE ORIGINAL ACT OF 1857 AND IN THE CONSOLIDATION ACT OF 1869.

Both of these Acts expressly provide that the following language of the Revised Statutes of 1829 and 1857 respectively shall apply to the plaintiff-in-error and these statutes creating it:

"The Charter of every corporation which shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

VI

THE WATERS OF BLACK ROCK HARBOR, SPANNED BY PLAINTIFF-IN-ERROR'S DRAW BRIDGE, ARE WHOLLY WITHIN THE TERRITORIAL BOUNDARIES OF THE STATE OF NEW YORK.

Finding XX (R. p. 64).

VII

SQUAW ISLAND, WHICH PLAINTIFF-IN-ERROR'S DRAW BRIDGE ACROSS BLACK ROCK HARBOR CONNECTS WITH THE MAINLAND OF THE CITY OF BUFFALO AND STATE OF NEW YORK, IS WHOLLY WITHIN THE TERRITORIAL LIMITS OF SAID STATE.

Finding XXI (R. p. 64).

VIII

THE PLAINTIFF-IN-ERROR'S STRUCTURE CONSISTS OF THREE DISTINCT PARTS, VIZ: (a) THE DRAW BRIDGE ACROSS BLACK ROCK HARBOR FROM THE MAINLAND OF BUFFALO TO SQUAW ISLAND, (b) THE EMBANKMENT ACROSS SQUAW ISLAND, (c) THE BRIDGE ACROSS THE NIAGARA RIVER FROM SQUAW ISLAND TO CANADA.

Plaintiff-in-error's request VI. Found by the Trial Court (R. pp. 30-31).

While not of any great importance, and not deemed to require a specific finding, it appears without dispute from maps put in evidence by the plaintiff-in-error and from the testimony of its

chief engineer, that the respective lengths of these three sections of the structure, were:

- (a) The draw bridge across Black Rock Harbor about 435 feet.
- (b) The embankment across Squaw Island about 1,200 feet.
- (c) The bridge across the Niagara River about 1,900 feet.

Stafford (R. p. 98).

IX

THE ABSOLUTE RIGHT TO CONNECT WITH AND USE PLAINTIFF-IN-ERROR'S BRIDGES AND EMBANKMENT AND THE RAILS AND ROADWAYS TO BE PLACED THEREON AND THE APPROACHES THERETO, FOR INTRA-STATE, AS WELL AS INTERSTATE TRAFFIC, TO AND FROM SQUAW ISLAND WAS EXPRESSLY SECURED TO THE OWNERS THEREOF FOR ALL TIME, BY THE DEED TO PLAINTIFF-IN-ERROR OF ITS RIGHT OF WAY ACROSS THE ISLAND, ON WHICH THE EXISTENCE OF THE BRIDGE DEPENDS.

This appears from the two deeds from Niagara River Hydraulic Company (the owner at those times) to the plaintiff-in-error dated respectively May 18, 1871, and August 6, 1874, put in evidence by the latter, each of which contains the following reservation and covenant in substantially the same language which is quoted from one of them:

"It is mutually understood and agreed by and between the respective parties to this indenture, signified by its execution and acceptance, that the party of the first part and its successors and assigns shall have the right in common with the public at large to

use the bridge and railroad tracks erected and constructed or to be erected and constructed and maintained by the party of the second part upon the premises above described and across the waters at either end to the main shores of the Niagara River upon paying therefor the tolls and charges allowed by law and further that all reasonable and proper rail and other connections may be made with such bridge and with the railroads to be laid thereon by means of proper switches and appurteuances as shall be required by the party of the first part, its successors or assigns for the use and improvement of Squaw Island or any part thereof and ingress and egress required thereby and for the business which may be transacted upon the same."

Plaintiff-in-error's exhibits 7 and 8.
R. pp. 71-72.

While there is no specific finding on this point, it is one of the details which go to make up and justify:

Finding XXIV (R. p. 65).
Conclusions of Law, I, II, VI and VII
(R. pp. 65-66).

It is a distinct and definite admission by the plaintiff-in-error contained in Exhibits voluntarily introduced by it to prove its own case — its lawful right to maintain its structure.

X

"THE PROBABLE COST OF CONSTRUCTING THE ROADWAY AND FOOTPATH REQUIRED BY CHAPTER 666 OF THE LAWS OF 1915 IS INSIGNIFICANT IN COMPARISON TO THE ASSETS AND ANNUAL NET EARNINGS OF THE PLAINTIFF-IN-ERROR."

Finding of Fact XXII (R. pp. 64-65).

In this specific and absolute language, the trial court covered conclusively much evidence.

By refusing to find appellant-in-error's Request XXVI (R. p. 42) the trial court settled finally so far as this court is concerned, that the cost of the construction would not be as much as forty-four thousand dollars (\$44,000.00).

The only evidence offered by the plaintiff-in-error on this question, was to the effect that a sixteen foot roadway and a four foot pathway, *designed to carry two fifty ton trolley cars* would cost thirty-two thousand five hundred seventy-six and twelve hundredths dollars (\$32,576.12) (folio 340).

The defendant-in-error did not contest that statement.

But it proved by competent evidence that a footpath four (4) feet wide and a roadway twelve (12) feet wide, properly designed to carry four eighteen (18) ton loaded automobile trucks at the same time, more than an ordinary highway bridge is built to carry, would have cost in the first two months after the act became effective, ten thousand four hundred fourteen dollars (\$10,414.00)

and in the last six months of 1915, thirteen thousand seventeen dollars (\$13,017.00) (R. pp. 162, 163, 168). *This evidence also stands wholly undisputed.* Indeed, the plaintiff-in-error's engineer who gave the figures as to the fifty-ton trolley car bridge, recalled to dispute the defendant-in-error's figures, declined to do so, saying merely: "Well, without having seen his exact calculations it appeared that the difference must be due to the fact that he did not figure on quite as heavy a maximum load as I did and that the bridge was to be not quite so wide" (R. p. 176).

The balance of plaintiff-in-error's forty-four thousand dollars (\$44,000.00) estimate of cost which the court refused to find, was an item of thirteen thousand two hundred dollars (\$13,200.00) which it claimed, but wholly failed to prove, was the value of all the indefinite amount of land it owned between Niagara street and Black Rock Harbor, a minute fraction of which would be used for the approach to the roadway benefiting and not subtracting from the value of the rest.

R. p. 87.

R. p. 93

R. p. 106.

R. pp. 113-115.

Map Exh. "A."

Refusing to find the appellant's cost figure, the trial court necessarily adopted the figure of thirteen thousand seventeen dollars (\$13,017.00) maximum established by the defendant-in-error as the cost of a pathway and roadway fulfilling

all requirements of the Statute. No other conclusion was possible. *There is nothing in the Statute requiring the plaintiff-in-error to provide a roadway for fifty ton trolley cars.*

As to the other element in this finding — the annual income of plaintiff-in-error — that was to all intents and purposes stipulated by it.

Exhibits "M," "N," "O," "P,"
"Q," "R" and "R1."
R. pp. 178-179.

From these exhibits, which were statements of the plaintiff-in-error's earnings, examined and admitted by its counsel to be correct with certain changes, which he made, it appears that in year ending June 30, 1915, the last for which figures were obtainable, its net profits were three hundred forty-four thousand dollars (\$344,000.00) on a capital stock of one million five hundred thousand dollars (\$1,500,000.00), 22-98/100%, after deducting interest at seven per cent (7%) on eight hundred thousand dollars (\$800,000.00) of bonds and all operating and maintenance expenses.

The other years covered by the exhibits showed similar earnings.

XI

" THERE IS NO EVIDENCE IN THE RECORD SHOWING THAT THE INVESTMENT REQUIRED BY CHAPTER 666 OF THE LAWS OF 1915 WOULD NOT YIELD A REASONABLE RETURN TO THE DEFENDANT."

Findings of Fact XXIII (R. p. 65).

The trial court also refused plaintiff-in-error's request to find that the annual interest and maintenance expense to defendant of the roadway and pathway required would be more than eight thousand dollars (\$8,000.00).

Defendant's Request XXVII Refused
(R. p. 42).

The plaintiff-in-error's claim as to annual cost which the court refused to find is based on an investment of forty-four thousand dollars (\$44,000.00) (disallowed by the trial court as above pointed out) and exaggerated charges of all sorts including the absurd statement, characteristic of all the rest, that the wages of two men at sixty dollars (\$60.00) per month each, amounts to two thousand eight hundred eighty dollars (\$2,880.00) per annum (R. pp. 87-88).

It appeared that plaintiff-in-error in negotiations with defendant-in-error while the Act was pending had placed its annual expense, including interest on the investment, for a fifty ton trolley bridge twenty (20) feet wide at three thousand three hundred dollars (\$3,300.00) per annum.

R. pp. 97, 146.

This court will find if it cares to go into the details that two thousand five hundred dollars

(\$2,500.00) per annum is ample allowance on the cost of such a roadway and pathway as the statute actually requires. For plaintiff-in-error's own figures made in business negotiations and not in creating evidence for a law suit covered a fifty ton trolley roadway and not merely the roadway required by the Statute.

As to what income could be reasonably expected *after* the roadway and pathway were constructed, the plaintiff-in-error offered no evidence whatever except numerous photographs showing that the Island, *without such facilities*, is vacant, exclusive of boat houses and small homes along its rim, while the mainland, four hundred feet away, is crowded with manufacturing plants which counsel had to explain were not upon the island as they appeared to be, because so near that they could not be kept out of the photographs.

Exhibit 31a (R. pp. 77-78, 98-99).

The defendant-in-error proved by uncontradicted evidence three great sources of revenue awaiting only the facilities in question, viz.:

(a) A going business having ample capital, producing in its first year from the Island, for sale and delivery in the city of Buffalo, by railroad and truck, one hundred thousand (100,000) tons of sand and gravel of high commercial quality, with inexhaustible supply of material and limitless market, and every prospect of continued increase in tonnage to four hundred fifty thousand (450,000) tons per annum within two or three years.

Defendant's Request XXIII Found by the Court (R. pp. 40-41).

(b) An existing use, of many years standing, by some hundreds of tenants of motorboat houses and homes on the Island and by thousands of their friends on occasions, notwithstanding there was no convenient or safe means of access. It appeared this use alone would increase many times with the facilities in question and should in itself support them.

R. pp. 125-128.

In this connection, the court's refusal to find as a fact the plaintiff-in-error's characterization of this use and source of revenue should be noted.

Defendant's Request XXII Refused by the Court (R. p. 40).

(c) The development of the property as a Lake, Rail and Barge Canal Terminal, with manufacturing sites, for which plans were already made by a public service corporation with ample backing awaiting only these facilities without which such a development was obviously impossible and with which the Island would become the most available and desirable site therefor.

Defendant's Request to Find XXV Found (R. p. 41).

Ricker (R. p. 120).

Kellogg (R. pp. 134-135; 137-138).

Exhibit "C."

It is determined as a final fact so far as this court is concerned, that the evidence fails to show that the *existing traffic offered in the present state of the Island* would not furnish plaintiff-in-

error a revenue of more than two thousand five hundred dollars (\$2,500.00) per annum. The trial court so found by refusing to find the contrary as requested by the plaintiff-in-error:

Defendant's Request XXIV Refused by
the trial court (R. p. 41).

XII

BLACK ROCK HARBOR, IS AND WAS AT THE TIME THE ACT CHAPTER 666 OF 1915 WAS PASSED, A SHIP CANAL, DESIGNED TO CARRY THE LARGEST VESSELS ON THE GREAT LAKES, BUILT AND MAINTAINED BY THE FEDERAL GOVERNMENT FROM THE END OF LAKE ERIE AT THE SOURCE OF THE NIAGARA RIVER, ABOUT ONE MILE ABOVE OR SOUTH OF SQUAW ISLAND TO ITS LOWER OR NORTHERN END WITH A SHIP LOCK BACK INTO THE NIAGARA RIVER AT THE LATTER POINT.

The water in the canal is held at the level of Lake Erie (some four feet above the level of Niagara River at the lower end of Squaw Island), by a retaining wall along the eastern side of Squaw Island and extending south to Lake Erie. This ship canal was constructed by the Federal Government since 1899.

The Federal Government, however, did not build the retaining wall or first make Black Rock Harbor into an artificial canal or basin. That was done by the State of New York when it first built the Erie canal as a necessary and integral part of that century old public work. Until the Federal Government built its ship canal, Black

Development Corporation. That said Squaw Island Sand & Gravel Corporation in the year from June 1915 to June 1916 removed from said Island by boats 100,000 tons of gravel."

Plaintiff-in-error's Request XXIII
Found by Trial Court (R. pp. 40-41).

"That plans were made for the development of Squaw Island in 1894 and the persons interested in the Squaw Island Development Corporation and the Squaw Island Sand & Gravel Corporation have organized several other corporations for the future development of Squaw Island including the Squaw Island Freight Terminal Co. Inc., and caused plans to be prepared in February 1913 for the projected development of Squaw Island as a land and water freight terminal, but no steps have been taken as yet to carry any of such plans into effect"

Plaintiff - in - error's Request XXV
Found (R. p. 41).

"That Squaw Island in said river is wholly within the territorial boundaries of the United States and of the State of New York."

Finding XXI (R. p. 40).

The outlines of the picture sketched by these findings of subsidiary facts, filled in with the facts of common geography and knowledge of which this court will take judicial notice, are impressive and sufficient in themselves.

Here is a tract of one hundred twenty-four (124) acres of deep water harbor land separated

from the mainland of one of the greatest and most congested ports of the world by a ship canal some four hundred (400) feet wide which it borders for a mile. It is crossed by a railroad connecting it with trunk line railroads east and west. The barge canal ending at Tonawanda four miles below, must send its boats to Buffalo terminals through the ship canal past Squaw Islands mile of frontage thereon.

A corporation, organized for the purpose under the New York Transportation Corporations Act, Art. 10a, declaring it to be a public service corporation subject to the control of the State's Public Service Commission, with the power of eminent domain — essentially of the same general character as the plaintiff-in-error or any railroad — has been formed to develop on this highly desirable and available tract of large dimensions with every needed facility *except roadway connection with the mainland*, an independent Lake, Rail and Barge Canal Terminal with manufacturing sites for enterprises requiring those facilities. It has had complete plans made for that development. But until this roadway connection is provided, the undertaking of great public interest and value, is obviously stalled and held up. It has an absolute contract under which it can compel the plaintiff-in-error to permit it to connect with and use the railroad upon plaintiff-in-error's bridge on paying the same nominal tolls (\$1.00) for loaded and 50 cents for empty cars) that other railroads pay (covenant in deed of plaintiff-in-error's right of way quoted above). It has the same right under that cove-

nant to us the roadway upon plaintiff-in-error's bridge. *But the roadway has never been built and that is the only conceivable reason why this great tract of superb harbor land with every other facility and advantage remains undeveloped for the public use by the company chartered by the State for that purpose with its plans all made.*

An examination of the comprehensive testimony of competent witnesses wholly uncontradicted and of the maps and plans in evidence merely fill out the picture in complete and vivid detail. For instance, it appears that the plan provides nine thousand (9,000) feet of dockage, suitable for the largest lake vessels; that the plaintiff-in-error's bridge connects the Island with the New York Central, Erie, and Delaware, Lackawanna & Western belt lines at its eastern end and with the Grand Trunk, Pere Marquette, Wabash, and Michigan Central at its western end, and through these with all other trunk lines entering Buffalo; that immediately across the 435 feet of drawbridge is Niagara street, one of the main streets of Buffalo with double track trolley line; that no other land on the ship canal is available for this purpose and that Squaw Island is the only tract of harbor land in the port of Buffalo obtainable for this purpose; and that all things considered, it is the best site for such an independent terminal in the port of Buffalo; that the present owners gave back a purchase money mortgage of five hundred thousand dollars (\$500,000.00) when Squaw Island was recently bought.

Ricker (R. pp. 108-110; 116-120).
Exhibits "B" and "C."

Then there is the existing business, of "removing from said island" sand, grit and gravel which amounted to 100,000 tons in the first year. This laconic finding reasonably implies that such removal was made for sales and delivery in the adjoining market afforded by the city of Buffalo as such material obviously cannot be transported profitably any great distance from its source. This necessarily means that the material after being "removed by boats" has to be landed at a mainland dock and loaded thence into cars and truck for delivery. Whereas, with the roadway in question and rail connection it would be loaded direct into cars and trucks on the Island without the intervention of boats or mainland docks which latter represent an extra cost to the consumer for material which is now a necessity in building operations.

On this point the uncontradicted evidence if examined would be found to add many important details such as:

Squaw Island is composed to a depth of more than forty feet of the highest grade concrete material in an almost scientifically perfect aggregate of hard and clean sand, grit and gravel in correct proportions, containing approximately 6,000,000 yards of that material with annual accretions of about 100,000 yards. A yard weighs a ton and a half. The market for this material is practically unlimited at a profitable price. The first year's business should grow to 450,000 tons in two or three years.

Ricker (R. pp. 110-121).

Kellogg (R. pp. 138-139).

And finally there is the public necessity of providing a safe and convenient access to a large tract in the heart of the city for many hundreds of citizens who have for many years used this property for motor boat houses and other recreation purposes and even for homes, as tenants of the owners. This fact appears in the Findings only in the court's refusal to adopt the plaintiff-in-error's attempt to belittle that use.

Request to Find Refused (R. p. 40).

The evidence on this detail also is complete and conclusive.

Taylor (R. pp. 172-173).

Lytle (R. pp. 125-130).

Kellogg (R. pp. 149-152).

It is perfectly obvious that access to this large and valuable portion of the City must be provided either by building a new bridge across Black Rock Harbor or by compelling the plaintiff-in-error immediately to exercise its franchise dormant for half a century. There is no doubt whatever that the City or State could build such a bridge with the public funds—it would clearly be a public use. But another bridge across the ship canal just above the lock would be a serious interference with navigation not to be permitted so long as the plaintiff-in-error's bridge can serve the purpose satisfactorily without such added obstruction or any interference with its present use for railway purposes.

On what possible theory could the trial court have reached any other conclusion than that crystallized in his finding XXXIV?

XIV

" THAT THE DEFENDANT HAS FAILED AND NEGLECTED TO CONSTRUCT OR PLACE UPON THE BLACK ROCK HARBOR DRAW OF ITS SAID BRIDGE A ROADWAY FOR VEHICLES OR A PATHWAY FOR PEDESTRIANS AS REQUIRED BY SAID CHAPTER 666 OF THE LAWS OF 1915, AND HAS TAKEN NO STEPS TOWARDS THE CONSTRUCTION OF SUCH ROADWAY AND PATHWAY."

Finding XVII (R. pp. 62-63).

ANALYSES OF PLAINTIFF-IN-ERROR'S LEGAL CONTENTIONS

I

The findings of fact by the trial court and its refusals to find facts requested by the plaintiff-in-error being clearly justified by the evidence and unanimously affirmed by the Appellate Division and the Court of Appeals, it would seem that several of the plaintiff-in-error's principal contentions in the courts below were now eliminated as issues in this case.

In this class of legal issues so eliminated are plaintiff-in-error's contentions that the prospective revenue from the required roadway arm would not be a fair return upon the investment, and that no public purpose would be subserved thereby, and with those issues any possible contention that there is any taking without compensation of tangible property goes out of the case.

II

The minor claim, thrown in merely as a make-weight, that the Act of 1915 is unconstitutional in that the section as to tolls permits the use of the roadway by empty commercial vehicles without paying anything for that privilege, requires little consideration. The facts that a large tonnage toll is imposed upon the loads carried by such vehicles and that going to the Island implies coming back loaded as they cannot go anywhere else — that an ample round trip toll is in effect provided — may not make any impression on plaintiff-in-error's distorted conception, but can hardly fail to answer the objection, in the judgment of the court. Since, as plaintiff-in-error concedes and must concede, the Act is severable and may stand notwithstanding this minute theoretical omission, if it is one, we do not see how the contention, if sound, could affect this appeal.

III

Plaintiff-in-error's remaining legal contentions, open to discussion before this court, may be fairly summarized as follows:

It admits and claims that it has possessed for a number of years complete franchise, authority and right from both the State and Federal Government to build the roadway arm in question — that it requires no additional authorization from any government; that building such a roadway arm upon its Black Rock Harbor draw, expressly

designed and constructed for that purpose, would not require any reconstruction thereof or interfere in any way with its present use for railroad trains; that no positive franchise is taken away or abridged by requiring it to construct that roadway; that this roadway will be wholly within the State of New York and limited entirely to intra-state traffic and is therefore wholly outside the jurisdiction of the Federal Government so far as compelling its construction is concerned. And yet it insists that the State of New York, the only authority which could possibly compel it to exercise the franchise which it possesses, is powerless to do so for these reasons:

(a) Because it has acquired also a peculiar and unique franchise, right and privilege, to wit:

The *negative* right, privilege and franchise not to build the pathway and roadway — not to exercise its *positive* franchise — until it sees fit do so.

It contends that the Act of 1915 is unconstitutional, not because it takes away or abridges any positive or express right of franchise (which it concedes is not the case) but because it takes away or abridges this novel conception, the alleged negative and implied franchise not to exercise the positive franchise while continuing to possess that positive franchise inviolate.

It admits the right reserved to alter, amend or repeal its original charter but insists the Legislature cannot exercise it solely because of this negative franchise which counsel have created for it out of the stuff that dreams are made of.

To create and make permanent its newfangled implied franchise to be above all law, is the only conceivable object justifying its resistance to this

law. Only the dim possibility of acquiring such an extraordinary asset, justified risking the penalties imposed by the Act of 1915 (already several times greater than the entire cost of the roadway).

(b) Because the Federal Government though it has given its complete assent and approval, might have refused such consent if it had wished to, under its powers over navigable waters.

(c) Because it might theoretically reduce the rate per cent of net earnings from the present .22933 on the capital of \$1,500,000 derived from interstate commerce, to .227657 on the old capital plus the new investment of say \$15,000. For the trial court found merely that the roadway investment would yield a "reasonable return" which of course means 6 per cent or nine hundred dollars (\$900). Dividing three hundred forty-four thousand nine hundred dollars (\$344,900) by one million five hundred fifteen thousand dollars (\$1,515,000) gives the decimal last stated. This reduction is approximately one-sixth (1/6) of one per cent (1%).

It may be difficult to see how this reduction in the average net return to the appellant which still remains nearly four times what the courts call a "reasonable return" can be a burden upon interstate commerce.

(d) Because in a deed of *property*, expressly restricted to use for navigation purposes only, the State Land Board has by implication abandoned *in toto* the sovereignty of the State over Black Rock Harbor and incidentally over the plaintiff-in-error. It is true that this conveyance was subject to all rights and duties previously

acquired by and imposed upon the plaintiff-in-error including the right and obligation to build a roadway arm upon its bridge; that the Federal Government subsequently granted specifically the right to build the particular roadway arm in question on the Black Rock Harbor drawbridge; that the Federal Government could not acquire or exercise the sovereignty so abandoned in so far as compelling this roadway arm for intrastate traffic only is concerned; that Squaw Island still remains a part of the State and the city of Buffalo though separated therefrom by an independent kingdom; that plaintiff-in-error still remains a creature of the State subject to its laws in all other respects including taxation; that the effect of the transaction as seen by the plaintiff-in-error is to transfer to it or rather to its owner the Grand Trunk Railroad of Canada and London, the sovereignty so abandoned by the State and not acquired by the Federal Government. But the strange result must not be weighed against the theoretical fact logically inevitable. The plaintiff-in-error being unique in that it is the creature of three governments, each limited in jurisdiction, it is not surprising that in some respects it has no sovereign at all—except of course the Grand Trunk railroad.

(e) Because the ultimate termini of plaintiff-in-error's structure being on the mainland of Canada and on the mainland of New York it must be treated as though the intervening Squaw Island did not exist.

It is true that to save building twelve hundred (1200) feet of expensive bridge it acquired at the

outset, a right of way across Squaw Island on which one-third of its structure rests, and that the consideration for that grant was a solemn covenant by it that the owners of Squaw Island should forever have the right to connect with and use appellant's rails and roadway.

At first blush it would seem that the plaintiff-in-error by this transaction became obligated to include service to Squaw Island as part of its legal duty. There is nothing in its charters expressly or impliedly forbidding that service which would merely add to its usefulness as an instrument of commerce. If there was any question as to its having a franchise to do so Chapter 666 of the Laws of 1915 removes that doubt. The liability necessarily existed from the moment the deed was accepted. There never was a time when the exercise of its franchise was not "burdened" with that obligation since its structure was first planned and built.

But being primarily an instrument of interstate and foreign commerce, it is beyond the reach of any sovereignty or court which seeks to enforce that obligation.

The conveyance to it of its right of way is inviolate but its covenant given as consideration therefor, is a "scrap of paper." The owners of Squaw Island should have known this as no one can plead ignorance of the law. The Grand Trunk Railroad, also an instrument of foreign commerce, in buying all of its bonds and stock, had a right to rely upon the fact that it owned the right of way but the covenant to pay for it was illegal and void. Under those conditions any attempt to enforce or take action upon the covenant

is a taking of property without compensation. It makes no difference that on this theory the property was originally acquired by theft.

The foregoing is not irreverent sarcasm as it may seem to be, but an honest effort to express the essence of the position which the plaintiff-in-error has taken for half a century in opposition to the continuous demand on both sides of the Niagara River that it be compelled to exercise the franchise (in its nature exclusive) which it has possessed all those years, and the position which it takes as to this final effort of the State of New York to appease the righteous wrath of the public, at least as far as lands within its own boundaries are concerned, and as to the portion of plaintiff-in-error's structures where such a roadway can be hung without rebuilding the structure or interfering with railroad traffic.

**THE DEFENDANT-IN-ERROR'S POSITION
IS:**

I

That the plaintiff-in-error was never granted and does not possess any special, negative franchise, express or implied, by virtue of which it is freed from the general obligation imposed upon all public service corporations to exercise positive franchises for the public benefit and therefore the Act of 1915 does not take away or abridge any franchise which it possesses.

II

That Chapter 666 of the Laws of 1915 merely set a limit to further delay in performing a duty imposed half a century before by the grant and acceptance of its Charter and made it possible to enforce that duty by providing a penalty for any further delay.

III

That even if the plaintiff-in-error had not been chartered expressly to build a bridge for pedestrians and vehicles as well as for railroad cars, the State had, under its police power and the right reserved to alter, amend and repeal, power to add the requirement of a pathway and roadway on the section of the bridge within its territorial limits where, as here,

(a) The structure was planned therefor and such pathway and roadway could be hung thereon without rebuilding any part of the structure or in any wise interfering with its present use for railroad trains.

(b) The Federal Government had exercised its powers to prevent obstruction to navigable streams by formally authorizing and approving such footpath and roadway.

(c) "The probable cost of constructing the roadway, and footpath required by Chapter 666 of the Laws of 1915, is insignificant in comparison to the assets and net earnings of the defendant."

(Finding XXII, R. pp. 64-65.)

(d) "The construction of the roadway and footpath required by Chapter 666 of the Laws of 1915, was and is necessary for the public interest and for the public convenience."

(Finding XXIV, R. p. 65.)

(e) "There is no evidence in the record showing that the investment required by Chapter 666 of the Laws of 1915 would not yield a reasonable return to the defendant."

(Finding XXIII, R. p. 65.)

(f) The land within the State, which this portion of the bridge connects, over waters of the State, with the main lands of the State, is a large tract immensely valuable for deep water harbor purposes and has the absolute right by express covenant of plaintiff-in-error, given in payment for its right of way across that land, to connect with and use the rails and roadways upon such bridge not only for the ultimate occupants thereof but for the "improvement" of that land.

IV

That the Federal Government, having, at plaintiff-in-error's request, approved the original charter authorizing a footpath and roadway and having expressly authorized it to construct the bridge as in said charter provided, and having further specifically approved and authorized the pathway and roadway upon the Black Rock Harbor span, directed by the Act of 1915, prior to that enactment, the fact that the Federal Government might have objected but did not, is certainly not an issue in this case.

LAW**POINT FIRST**

CHAPTER 666 OF THE LAWS OF 1915 DOES NOT IMPAIR THE OBLIGATION OF CONTRACTS, ITS SOLE PURPOSE AND EFFECT BEING TO ENFORCE THE ONLY CONTRACTS INVOLVED.

I

Before engaging in the endless discussion of the principle announced by Chief Justice Marshall and the antidote suggested by Justice Story, in the Dartmouth College Case (4 Wheat 518), it is wise to consider whether the volumes of learned writings on these subjects have any possible application to the case in hand.

Assuming that a charter is a contract even where it contains in itself, as here, Mr. Justice Story's self-destroying germ—the reserved right to alter, amend or repeal—what was the contract so created between the plaintiff-in-error and the State of New York and how is it "impaired"?

In addition to its corporate powers (which are not affected by the Act of 1915) the plaintiff-in-error unquestionably acquired through the original New York and Canadian Acts incorporating it, the New York Act consolidating the two corporations, so formed and the United States statute authorizing the construction of the bridge in accordance with the provision of the original New York Act of 1857, a full, complete and absolute franchise to build a bridge "*for persons on foot and in carriages and otherwise*" and for railroad trains.

The New York Statute of 1857 (Chap. 753) provided:

“ § 15. Said bridge *may* be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains.”

The Canadian Statute (227 of 20th Victoria), provided:

“ Said bridge *shall* be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains.”

The New York Consolidating Act (Chap. 550, Laws of 1869) provided that the Canadian and New York corporations consolidated thereby should have all the powers and franchises and be subject to all the duties of the corporations so consolidated.

The Act of Congress of June 30, 1870, Chapter 176, approved and authorized and declared to be a lawful structure any bridge constructed “ in pursuance of the provisions of ” the New York Act of 1857 and amendments thereto.

Assuming that plaintiff-in-error’s franchise so granted to construct a bridge “ both for persons on foot and in carriages and otherwise and for railroad trains ” was a contract with the State of New York which the latter could not “ impair,” though it had expressly reserved the right to alter, amend or repeal, *in what respect does Chapter 666 of 1915 “ impair ” that contract?*

If the State of New York had attempted by the Act of 1915 to take away from plaintiff-in-error either its franchise to construct and operate a

bridge for railroad trains or its franchise to construct and operate a bridge for pedestrians and vehicles, we can understand that the question of impairment of contract might arise.

Or if the required exercise of the franchise to build a roadway and pathway interfered with the enjoyment of the franchise to operate railroad trains or required the rebuilding of an existing structure with consequent interruption of railroad traffic, complaint might be justified though "impairment" could hardly be predicated.

But how an Act which instead of taking away or interfering with either franchise, merely compels plaintiff-in-error to exercise both instead of only one "impairs" either, is beyond our comprehension.

Confronted with the obvious necessity of having something "impaired" before his impairment of contract authorities can be used, counsel invents an additional and entirely new and original franchise, which he says this particular statute of 1857 conferred upon the appellant, to wit: an implied negative franchise not to exercise, until it sees fit, the positive franchises so granted.

The chief difficulty in destroying this fantastic conception lies in grasping a thing so subtle and volatile and holding it long enough to permit of analysis.

The plaintiff-in-error does not suggest that there is any peculiarity in the language used in the original grant of these franchises on which such a claim can be based. The object being to create a commission to form a corporation, the language was necessarily permissive. It could not require either the commission or the corpora-

tion as yet unborn to build a bridge either for railroads or for pedestrians and vehicles or any bridge at all. But the plaintiff-in-error suggests the legislature *might* have said "if any bridge is built for pedestrians and vehicles it *shall* be built for railroads also and if any bridge is built for railroads it *shall* be built for pedestrians and vehicles also." Failure to employ that unnecessary and unusual language implies, it insists, an unnecessary and unusual conclusion, viz: that this public service corporation should possess a unique and special franchise not given to other corporations of its class — the *negative* franchise to possess and not be required to use the *positive* franchise so granted.

That is the sum total of its position on this branch of the case. This negative franchise to possess and not use, so implied, is the only alleged contract upon which it depends to bring this case within the obligation of contracts clause of the Federal Constitution.

A sufficient answer would seem to be (using plaintiff-in-error's own method of producing a positive by the multiplication of negatives), to point out that if the legislature intended to grant this special negative franchise, it could have said so and not having said so, it did not so intend.

Having made that preposterous claim the plaintiff-in-error is confronted, at the threshold of its long review of authorities on the obligation of contracts clause, by the unfortunate fact that the Canadian Act in the section above quoted does use practically the language the plaintiff-in-error suggests, and the further fact that any duty imposed by the Canadian Act was adopted into the

New York Statute by the New York Consolidation Act of 1869 as above mentioned and hence the word *shall* in the Canadian Act was automatically substituted for the word *may* in the original New York Statute of 1857.

To dispose of that grave difficulty, the plaintiff-in-error then attempts to show that the word *shall* in the Canadian Act was a thoughtless error and use practically the language the plaintiff-in-error must be read as though spelt *may*. It seems unnecessary to follow the elaborate argument or to go into the long opinion of a Canadian Court which has been printed at the end of the record and on which that subtle argument is based. The trial court refused to find that the Canadian Court had so decided or had decided anything at all except that it had no jurisdiction of the subject matter of the action and that the bridge as constructed did not constitute a nuisance and that determination is amply justified by a casual reading of the opinion.

Request VIII., R. pp. 31-32.

Finding VIII., R. pp. 56-57.

The actual view taken by the Canadian Court is expressed by it in the following language:

"to hold that such a structure * * * could be abated as a nuisance because the company has omitted or refused to complete some portion of the structure intended for the use of carriages and foot passengers, and not in the slightest degree affecting the navigation of the river, would be a reflection on the administration of justice. The fallacy consists in calling the abandonment of a por-

tion of the work a public nuisance, instead of, what it probably is, an abuse of the Act of Parliament."

(R. p. 183-184.)

II

There is something really humorous in the effort to mislead the court in this respect.

Instead of *impairing* any contract the sole purpose and effect of the statute, Chapter 666 of 1915, obviously is to compel the plaintiff-in-error to perform, after a half century of neglect and failure, the only contracts involved:

(a) Its contract with the State implied from its acceptance of its charter and franchises, to provide a pathway for pedestrians and a roadway for vehicles on its bridge.

(b) Its express contract with the owners of Squaw Island to provide those facilities, made as the consideration for the grant of the land on which one-third of its entire structure rests.

The unavoidable complement of the rule that a charter and grant of franchises constitutes a contract on the part of the State is that the acceptance thereof by the corporation constitutes a contract on the part of the corporation as well — else there could be no contract at all.

This proposition is fully recognized and established by the court which held that charters are contracts, in many decisions of which these are recent examples:

In *Atlantic Coast Line v. N. Car. Corp. Com.* (206 U. S. 1), the court said at page 27:

"As the duty to furnish necessary facilities is co-terminous with the powers of the corpo-

ration, the obligation to discharge that duty must be considered in connection with the nature ad productiveness of the corporate business as a whole, the character of the service required and the public need for its performance."

In *Mo. Pac. v. Kansas* (216 U. S. 262) the same principle was enunciated at page 277-278:

"The first and pivotal question arising is whether the order complained of did anything more than command the railroad company to perform a service which was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers and which it could not refuse to perform so long as the charter powers remained and the obligation which arose from their enjoyment continued to exist."

And in *Ches. & Ohio Ry. v. Public Service Com.*, (242 U. S. 603), the court expressed the same doctrine in the following language at page 607:

"One of the duties of a railroad doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them and its performance cannot be avoided merely because it will be attended by some pecuniary loss."

In each of these cases a State had required an interstate railroad to run special passenger trains on branch lines within the State, and the require-

ment was sustained by the Supreme Court on the principle enunciated in the above quotations, although in each case it was clearly proved that the service required could not be furnished except at a great loss.

As to the contract with the owners of Squaw Island, it is an express and definite covenant contained in the deeds by which plaintiff-in-error acquired the strip across the Island 200 feet wide by 1200 feet long on which it built the embankment connecting its two bridges thereby saving the immense expense of an additional 1200 feet of piers and steel structure. The language of this covenant is quoted under point IX of the Statement of Facts.

In addition to the right and duty of the State to see that its creature should not any longer refuse to pay the agreed and reasonable price for the valuable right it so acquired and continues to enjoy, it is a fact, as found by the trial court, that enforcement of that contract was necessary for the public interest and convenience in making a large and patently valuable deep harbor section of the city of Buffalo available for development and use by the public in general.

Finding XXIV., p. 65.

III

To meet the dim possibility that the court can succeed where we have failed, in discovering in plaintiff-in-error's charter any contract which might possibly be "impaired" by the Act of 1915 we respectfully refer the court to the following selection from the innumerable decisions called

forth by Chief Justice Marshall's doctrine that a charter is a contract, where Justice Story's suggestion that the right to alter, amend and repeal might be reserved has been followed, as it was in the charter granted the plaintiff-in-error.

Jefferson College v. Washington College, 13 Wall. 190.

Miller v. New York, 15 Wall. 478.

Hamilton Gas Light & Coke Co. v. Hamilton, 146 U. S. 258.

Sioux City S. R. Co. v. Sioux City, 138 U. S. 98.

Holyoke Water Co. v. Lyman, 15 Wall. 500.

Louisville Water Co. v. Clark, 143 U. S. 1.

Erie Railroad Co. v. Williams, 233 U. S. at p. 700.

Ramapo Water Co. v. City of New York, 236 U. S. 579.

Calder v. Michigan, 218 U. S. 591.

N. Y. & N. E. Railroad Co. v. Bristol, 151 U. S. 556.

Fair Haven & W. R. Co. v. New Haven, 203 U. S. 379.

Noble State Bank v. Haskell, 219 U. S. 104.

In none of the foregoing cases (nor in any other we have been able to find) is there any support for plaintiff-in-error's negative franchise to possess a positive franchise and not use it, nor any suggestion that compelling a corporation to perform its side of the contract is an impairment of contractual rights.

In all of these cases, important changes in charters were made under the reserved right to alter, amend and repeal and in most of them serious new burdens were imposed.

As said in one of the most recent cases cited *Erie Railroad Company v. Williams*:

"It may be admitted an advantage is taken away from plaintiff, or to put it another way, a burden is imposed upon it. Is it within the power of a State to impose the burden by virtue of its reserved control over plaintiff? The question must be answered as if the requirement of the law was part of the original charter * * * and it would seem necessarily to be the very essence of the right of amendment reserved that what could have been put in the charter originally, whatever its consequences, can be added to the charter whatever its consequences."

All the authorities which are cited and discussed below on the question of taking property without compensation, might be added to the foregoing. For, with the right reserved to alter, amend or repeal, all that is left of the obligation of contract clause, if anything, is covered by the 14th Amendment and the similar provision of the State Constitution. To "impair" under those conditions there must be a taking of what has become vested property.

POINT SECOND

THE STATUTE IS A PROPER AND REASONABLE EXERCISE OF THE STATE'S POLICE POWER AND THEREFORE DOES NOT CONTRAVENTE THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

I

The idea is not uncommon that a State's "police power" because of its unfortunate name is limited to the preservation of the public health, safety and morals.

Nothing could be further from the fact. It extends to all matters affecting the public convenience and general welfare including commercial prosperity; and the definition of what is a public use in aid of which it may be exercised, is precisely as comprehensive as the definition of a public use for which the right to exercise the right of eminent domain may be granted.

Noble State Bank v. Haskell, 219 U. S.
104.

Clark v. Nash, 198 U. S. 361.

Strickley v. Highland Boy Mining Co.,
200 U. S. 527.

Offield v. N. Y. N. H. & H. R. R. Co.,
203 U. S. 372.

Bacon v. Walker, 204 U. S. 311.

C. B. & Q. R. R. v. Drainage Com.,
200 U. S. 561.

Mo. Pac. R. Co. v. City of Omaha, 235
U. S. 121.

Erie R. R. Co. v. Williams, 233 U. S.
p. 700.

- N. Y. & N. E. R. Co. v. Bristol*, 151
U. S. 556.
Wisconsin, etc., R. Co. v. Jacobson, 179
U. S. 287.
Balt. & Ohio R. Co. v. I. C. C., 221
U. S. 612.
C. M. & St. P. R. R. Co. v. Minneapolis,
232 U. S. 430.
Close v. Glenwood Cemetery, 107 U. S.
466.
Shields v. Ohio, 95 U. S. 319.
Atlantic Coast Line v. Georgia, 234
U. S. 280.
Munn v. Illinois, 94 U. S. 113.
*Ches. & Ohio Ry. v. Public Service
Com.*, 242 U. S. 603.
Lake Shore & M. S. Ry. Co. v. Clough,
242 U. S. 375.
*Atlantic Coast Line v. N. Car. Corp.
Com.*, 206 U. S. 1.
Cummings v. Chicago, 188 U. S. 410.
C. A. T. Co. v. Chicago, 210 Fed. 7.
Minnesota Rate Cases, 230 U. S. 352.
West Chicago S. R. Co. v. Illinois, 201
U. S. 506.
Mo. Pac. Ry. Co. v. Kansas, 216 U. S.
262.
Mt. Vernon C. C. v. A. P. Co., 240
U. S. 30.

The foregoing decisions are a minute fraction of all those in the United States Supreme Court alone which might be referred to in support of this proposition. Each has been selected after careful examination because it has a definite bear-

ing upon this particular question, and all, with the innumerable others, are of one voice.

The *Minnesota Rate Cases* merely reiterate a principle established in the earliest days of the court that the regulation of the rates charged by public carriers or any other corporation of the class known as public service corporations, is within the "police power" of a state. As Mr. Justice Hughes says (p. 413):

"The power of the State to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grants of corporate privileges. In view of the nature of their business, they were held subject to legislative control as to the amount of their charges * * *."

In *Mo. Pac. Ry. Co. v. Kansas, supra*, it was held that it was a proper exercise of a state's "police power" to compel a railroad, incorporated elsewhere, to run a passenger train as distinguished from a freight train with passenger car attached, between two points within the state though the railroad proved beyond question that all its business within that state was done at a loss and the running of such a passenger train would not pay operating cost.

In *Noble State Bank v. Haskell, supra*, it was held that a statute requiring all banks in the state (except National) to join in guaranteeing the deposits in each other, was a proper exercise of the police power, the court saying:

"There is no denying that by this law a portion of its property might be taken without return to pay the debts of a failing rival

in business. * * * It may be said in a general way that the police power extends to all great public needs.

"Among matters of that sort probably few would doubt that both usage and preponderant opinion give sanction to enforcing the primary condition of successful business. * * * If then the legislature of the State thinks that the public welfare requires it, the measure under consideration, analogy and principle are in favor of the power to enact it."

To sustain its view the court turned to cases in which the exercise of the power of eminent domain had been sustained, on the obviously sound theory that whatever was a public use for which the right of eminent domain could be exercised, was a public use for which a State might exercise its police power and cited with approval among others, the next two decisions referred to herein.

Clark v. Nash, supra, is a case in which the condemnation of private property for an irrigation ditch to serve one ranch owned by a private citizen, was sustained.

Strickley v. Highland Boy Mining Co., supra, is a recent case in which the Supreme Court held constitutional a statute of Utah authorizing the condemnation of rights of way for tramways to mines, and condemnation thereunder of a right of way for an aerial tramway to one private mine was sustained.

In *C. B. & Q. R. R. v. Drainage Commission, supra*, also a recent case, the Supreme Court held constitutional as a proper exercise of the police power an order of the Illinois Drainage Commis-

sion requiring a railroad to remove and rebuild at large expense, its bridge across an unnavigable creek for the sole reason that the Commission desired to benefit a few private owners of a small section of land by improving its fertility, no question whatever of public health being involved as the court took care to point out, saying as to that:

“We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. * * * If the injury complained of is only the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation on account of such injury does not exist.”

In *Mo. Pac. R. Co. v. Omaha*, (1914) an order of the city of Omaha requiring a railroad to build at its own expense a viaduct 810 feet long over its tracks in the heart of the city where, at most, one less than 500 would have accomplished all the requirements of mere safety, was sustained as a reasonable exercise of the police power on the ground that the longer one would no doubt provide an easier grade.

Chicago, Mil. & St. P. v. Minneapolis, supra, (1913) was a case in which the city of Minneapolis, desiring to connect with a short canal two small lakes in its park system, for purely aesthetic reasons, took a part of a railroad's right of way, occupied by it for many years, paying for it a few dollars as mere land in the open country, and ordered it to build a bridge over the land so con-

demned, high enough not to interfere with the pleasure canal to be built in this part of the right of way so taken. Sustained as a legitimate exercise of the police power.

In *Munn v. Illinois, supra*, the right of a State to prescribe maximum rates for the elevation and storage of grain in elevators owned by private citizens, who had no interest in the railroads connecting therewith, was upheld on the ground that such structures were essential to commerce and transportation though not common carriers or owned by them—upon the ground of public interest on its commercial side.

Wisconsin, etc. Ry. v. Jacobson, is the leading and one of the extreme cases in which the right of a State under its police power exercised for purely commercial reasons, to compel a railroad to expend a large sum in building a connection with another railroad, including condemning the necessary land therefor, was sustained, notwithstanding that the connection would mean a distinct loss of business to the railroad so compelled to spend the money, the court saying:

“Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the defendant in error.”

In *Mt. Vernon C. Co. v. A. P. Co., supra*, it was held that the right of eminent domain could be exercised by a corporation furnishing electricity for power in taking private water powers and lands which was a proper exercise of the police

power. Justice Holmes in the opinion of the court, remarked:

"The inadequacy of use by the general public as a universal test is established."

In *Atlantic Coast Line v. N. Car. Corp. Com.*, *supra*, an order of a State Commission requiring it to run a passenger train which could not possibly pay operating cost, merely for the convenience of a few people, was sustained as a proper exercise of the police power. The court said:

"As the duty to furnish necessary facilities is co-terminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the service required and the public need for its performance."

In *Erie R. R. Co. v. Williams*, *supra*, it was said at page 700:

"It is hardly necessary to say that cost and inconvenience would have to be very great before they could become an element in the right of a State to exert its reserved power or its police power."

II

As appears from the foregoing summary of and quotations from some of the cases cited and as would more fully appear from the examination of all of them and the vast number of others which might be added, the exercise of the police power

is divided by sharp lines of distinction into several classes:

(a) In one class are those cases in which tangible physical property is actually taken possession of and applied to other use, as distinguished from compelling a corporation to incur an expense upon or in connection with its business or property.

Such is the exercise of the power of eminent domain, and in those cases fair compensation for the property so taken must be paid (except, of course, where something deleterious to the public health, safety or morals is taken and destroyed, naturally a class by itself).

(b) In another distinct class are those cases in which a general rate of charges is arbitrarily fixed covering the whole business of a public service corporation, or, where that business is both interstate and intra-state, governed respectively by two sovereignties, the State and the Nation, that portion of its business which is so governed by the sovereignty exercising the control in question.

Here of course no compensation for earnings lost by reason of the regulation is allowed, on the obvious theory that what is so cut off does not legally belong to the corporation, so long as it cannot prove that the rates as so fixed will not give it a fair return on the reasonable value of its investment, that minimum return being roughly fixed at 6 per cent net (*Willcox v. Consolidated Gas Co.*, 212 U. S. 19).

It being settled that the business or portion of the business so regulated is either intrastate or

interstate as the case may be, the sole question to be determined is whether the rates fixed will give the minimum fair return on the section of the business so regulated separately considered—that is charged with the separated earnings and credited with the separated costs of that portion. There is a strong presumption that the rates fixed are reasonable and they will be sustained unless the corporation clearly succeeds in proving otherwise, in which latter event the rates will be declared "confiscatory" as a taking of property by cutting off revenue to which the corporation is fairly entitled and the regulation will be declared void. That is the class of cases as to which the *Minnesota Rate Cases, supra*, is now the leading and final authority, it having recently (1913) established the law as above stated.

(e) *The final class within which the present case unquestionably comes embraces all those cases in which a public service corporation is required to do something in aid of the public interest, which will cost it money, with or without adequate compensation therefor, the question of compensation, in this class of cases, being of little more than nominal significance, the expense of carrying such a burden in aid of the public interest being regarded as merely a part of its general cost of doing business, like taxes, coal or rails or the liability for injuries to person or property with or without negligence, and to be considered with these other items in determining whether the general schedules of rates which the corporation is allowed to charge, produce the minimum fair return whenever that question arises. In this class of cases it is universally held that*

whether there are any earnings at all from the particular investment so required, is of little or no consequence. At most the amount of the investment is considered in comparison with the size of the corporation and its total earnings. And as we have already shown, the investment required must be very great indeed in proportion to total assets before the courts will declare the requirement, if within the limits of a state's police power, to be unconstitutional on that account.

The distinctions made are clearly and conclusively drawn in the case above cited and in the quotations therefrom and are obviously sound and necessary. As to this last class, we refer especially to the following decisions of this court:

- Noble State Bank v. Haskell.*
- C. B. & Q. R. R. v. Drainage Com.*
- Mo. Pac. Ry. Co. v. Omaha.*
- Chicago, Mil. & St. P. v. Minneapolis.*
- Atlantic Coast Line v. N. Car. Corp. Com.*
- Erie R. R. Co. v. Williams.*
- Wisconsin R. Co. v. Jacobson.*
- West Chicago Street R. v. Illinois.*
- Atlantic Coast Line v. Goldsboro.*

In every one of those cases, burdens were imposed for the public benefit costing large sums of money for which no ^{adequate} return from the burden itself was possible; in most of which instances there was no return at all and in none of which was any compensation paid by the State.

In *Mo. Pacific Ry. v. Kansas, supra*, the court draws the distinction:

"The first and pivotal question arising is whether the order complained of did anything more than command the railroad company to perform a service which was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers and which it could not refuse to perform as long as the charter powers remained and the obligation which arose from their enjoyment continued to exist."

III

The facts in this case, read in the light of those decisions, present several distinct objects and purposes, each of which is a sufficient justification in itself for this exercise of the State's police power, and all of which together pass beyond mere justification and constitute an overwhelming demand.

We ask this court to consider what some of those purposes and insistent demands were:

(a) The instant conversion of 124 acres of primeval waste into desirable terminal and factory property in the heart of one of the greatest ports, railroad centers and manufacturing districts in the world, utterly useless for such purposes without this exercise of the police power. Remember that in point of potential value and productivity this property exceeds several hundred thousand acres of farm lands, drained or undrained and in parity many millions of them.

(b) The removal of the only obstacle otherwise insurmountable, to the creation on that prop-

erty of a great public service Lake, Rail and Barge Canal Freight Terminal, with 9000 feet of deep water wharfs at the foot of Lake Erie and immediate connection with many trunk line railroads to east and west, by a corporation with its plans perfected, already organized under the State's Transportation Law which declares its purpose to be a public use for which it may exercise the right of eminent domain and because of which it is placed under the jurisdiction of the Public Service Commission precisely as a railroad is.

The late Mr. James J. Hill, a great authority, wrote and published a convincing pamphlet to show that the greatest of all commercial and transportation needs of the present and future were adequate terminals, such as this, in great traffic centers like Buffalo, dwarfing into comparative insignificance any need for more railroads through the open country. He further pointed out that the cost and difficulty of obtaining them was becoming greater all the time and would soon become prohibitive. A mere single grain elevator owned by a private citizen is now recognized as a public use subject to regulation under a state's police power. That the conditions in Buffalo require that a vast tract of harbor lands be restored to such uses and be developed therefor is patent.

(c) The provisions of decent, convenient and safe access, in the only manner possible, to this large section of the city, now used, even without such access, by many hundreds of respectable citizens for motorboat houses, boating clubs, many forms of pleasure and recreation and even

for permanent homes — a use which such decent access must multiply many times, especially when it provides also the police and fire protection for which the owners pay and cannot get.

(d) The provision of reasonable transportation facilities to citizens engaged in excavating sand and gravel, a commodity of general use obtainable here in unlimited quantities of excellent quality, enabling them to produce and handle it on their own land with efficiency and economy otherwise impossible. It has never been doubted that providing transportation facilities for a growing industry offering at its start an existing tonnage of 100,000 tons per annum with a probable growth in the immediate future to many times that volume was a public use within a state's police power. Compared with the aerial tramway to give convenient service to one little gold mine or the irrigation ditch to improve one ranch, it bulks very large indeed.

Hence the finding of the trial court unanimously affirmed by the Appellate Division:

“The construction of the roadway and footpath required by Chapter 666 of the Laws of 1915 was and is necessary for the public interest and for the public convenience.”

Finding XXIV (R. p. 65).

IV

The whole vast current of authorities flows to the unanimous and positive conclusion that in cases of this class it is immaterial whether the expenditure required will produce any income at

all, so long as the expense is small in comparison to the total assets and earnings of the corporation.

Upon this point the finding of the trial court unanimously affirmed by the Appellate Division, was:

"The probable cost of constructing the roadway and footpath required by Chapter 666 of the Laws of 1915 is insignificant in comparison to the assets and annual net earnings of the defendant."

Finding XXII (R. pp. 64-65).

In the Statement of Facts (Point X) at the beginning of this brief, we have called attention to the undisputed and wholly adequate evidence upon which that finding was based, on the theory that while the finding was sufficient in itself upon this appeal, this court might like to know that no injustice was done thereby. An investment of fifteen thousand dollars (\$15,000.00) is certainly insignificant when compared to assets of two million three hundred thousand dollars (\$2,300,000.00) and annual earnings from tolls alone (the plaintiff-in-error has no locomotives, cars or other equipment except a gasoline-operated street car) of four hundred forty-four thousand dollars (\$444,000.00) and net earnings of three hundred forty-four thousand dollars (\$344,000.00) applicable to dividends upon its stock of one million five hundred thousand dollars (\$1,500,000.00) (making approximately 23% thereon) after the deduction of 7% interest on its bonds and all conceivable maintenance and other charges.

V

But in this case the finding of the trial court upon ample evidence unanimously affirmed by the Appellate Division establishes finally for the purpose of this appeal, that the plaintiff-in-error wholly failed to show that it would not receive an adequate return from the required investment separately considered:

"There is no evidence in the record showing that the investment required by Chapter 666 of the Laws of 1915 would not yield a reasonable return to the defendant."

Finding XXIII (R. pp. 54-65).

The court will find in the Statement of Facts (Point XI) an analysis of the evidence on this subject justifying that finding and the refusals of the trial court to find at plaintiff-in-error's request that the investment required would be as much as forty-four thousand dollars (\$44,000.00) or that the annual cost would be as much as eight thousand dollars (\$8,000.00) or that the annual income would not exceed two thousand five hundred dollars (\$2,500.00).

Requests to Find XXIV, XXVI, XXVII refused (R. pp. 41-42).

There is no question at all that if the plaintiff-in-error could accomplish the impossible task of transferring this case from the class in which the question of return is immaterial to the class in which the rule as to "confiscatory" rates applies, the plaintiff-in-error was required to establish by conclusive evidence that it would not receive an

adequate return, before it could succeed in this action.

Minnesota Rate Cases, supra.

VI

The makeweight contention that this law may be declared unconstitutional as a taking of property without compensation, because empty commercial vehicles are not required to pay tolls, calls for merely passing notice.

As to whether the tolls provided in the Act are reasonable, no issue is raised except in the above particular. The fact that appellant voluntarily transports a passenger all the way across its bridge from Buffalo to Canada (about a mile) for five cents (Stafford folios 372-373) is sufficient reason why the tolls fixed for *passing over* 432 feet of the bridge are not contested.

It is highly improbable that defendant will be troubled by drays or motor trucks which run both ways unloaded, or go over to the Island and never come back. Sane people do not use valuable equipment in that foolish way. A round trip, one way loaded is the only reasonable expectation, and for that the Act provides a toll which appellant concedes is entirely reasonable.

Moreover, if the total return will be adequate as the trial court has found, the plaintiff-in-error could not be declared wholly unconstitutional as a taking of property without compensation if it were defective in this minute detail.

And finally, the Act is clearly severable and could not be declared wholly unconstitutional as a taking of property without compensation if it were defective in this minute detail.

VII

In its brief and argument before the Court of Appeals, the plaintiff-in-error went far outside the record in a long argument to create in the minds of the court the injurious and wholly erroneous impression that the Act of 1915 was merely a scheme designed and put through by the owners of Squaw Island to benefit themselves wholly at the expense of the Grand Trunk Railway of Montreal and London, which as plaintiff-in-error's owner gets back its entire investment therein only once in every four and one-half years.

No doubt that attempt will be repeated here. And while the decision of this case is in no wise dependent thereon, we think that as a matter of mere decency and justice to the owners of Squaw Island we may be permitted to say:

(a) That the owners of Squaw Island had nothing whatever to do with the original introduction of the bill in the State Legislature. It was simply the culmination of fifty years of effort on the part of the business men and officials of Buffalo and Fort Erie to get from this bridge the service originally intended. During all that time the Grand Trunk had staved off action by making one promise after another, the excuse for further delay being always that its present main bridge across the river, though designed therefor, could not now carry such a roadway, in addition to the increased weight of railroad trains, but that it had plans for and was about to rebuild its river span and then would provide this roadway. More years went by but the river span is still the same old structure. Being required a few years ago by

the Federal Government to rebuild the section across Black Rock Harbor, it constructed that section in accordance with its plans for a new structure across the river—that is, the Black Rock Harbor span is now a completed part of the new bridge, designed and built to carry a double track and a roadway on each side. The business men thought that the Grand Trunk no longer had any excuse as to that section at least. While the bill was pending, the owners of Squaw Island were called in to present to the Legislature the real facts, which they did, exactly as they have been proved and found by the court in this case, in answer to the violent lobbying and protests of plaintiff-in-error's counsel based on assertions which they have been unable to prove in this litigation when the opportunity to do so was afforded.

(b) Far from trying to get something for nothing out of the plaintiff-in-error or its owner, the owners of Squaw Island both before and after the Act of 1915 was passed, offered orally and in writing to either pay the entire cost of the roadway or to guarantee the receipt by plaintiff-in-error of an adequate return upon its cost and maintenance.

While the plaintiff-in-error will insist that the proof of this fact is not properly in the record, the formal question asked the witness to bring out this fact having been excluded on the ground that the evidence was immaterial, the fact does appear in the record as the sworn statement of the witness who personally knew its truth, hav-

ing made the offer himself, and it is wholly uncontradicted.

Record pp. 141-145.

At least as an answer to the plaintiff-in-error's wild assertions based on no suggestion whatever in the record, it ought to be sufficient.

POINT THIRD

THE FEDERAL GOVERNMENT PREVIOUSLY HAVING APPROVED AND AUTHORIZED THE ROADWAY ARM UPON PLAINTIFF-IN-ERROR'S BRIDGE, CHAPTER 666 OF 1915 CANNOT POSSIBLY CONTRAVENE THE FOREIGN AND INTER-STATE COMMERCE CLAUSE OF THE CONSTITUTION.

I

The State requires the plaintiff-in-error to hang a roadway upon its existing drawbridge across Black Rock Harbor, wholly within the State, connecting two sections of the City of Buffalo, both entirely within the State; the bridge was specially designed to carry that roadway, which can be attached without interference with or interruption to the present railroad traffic over the bridge, or the commerce passing through Black Rock Harbor in boats; the Federal Government had previously approved, consented to and authorized the specific roadway in question, in addition to authorizing such a roadway on the entire bridge from the mainland of New York to the mainland of Canada, before the original structure

was erected and again when the entire bridge was rebuilt some years ago.

Findings XX, XXI, XIV, IX and V (R. pp. 64, 59, 54).

Plaintiff-in-error's Exhibits 25 and 26.

The details thus briefly summarized are fully set forth and discussed in the Statement of Facts (Points I, II, III, IV, VI, VII and VIII). There is no dispute about them — indeed, they were all proved by the plaintiff-in-error and are all included in its requests to find.

No question is raised, or could be, as to the completeness and finality of the Federal authorization of this roadway, first by Congress itself, and then by the Secretary of War as to details left to him by Congress.

Nor is there nor can there be any controversy over the proposition that the Federal Government has no conceivable right or power to *compel* the plaintiff-in-error to build the roadway it had so approved, since it begins and ends and is at all points within the territorial limits of one State and city, and is necessarily provided for and dedicated to intrastate commerce exclusively. Manifestly the Federal power was fully exercised and completely exhausted when, as the guardian of interstate and foreign commerce, flowing over the bridge in railroad cars and under it in boats, it formally and finally determined that the roadway would not interfere therewith and *might be* constructed.

Being the final authority on the question whether this intrastate and intracity roadway

would interfere with interstate or foreign commerce, its decision was conclusive and ended all possibility of controversy on that question:

The State then said to this plaintiff in error:

" Since the Federal Government has determined this roadway will not interfere with foreign or interstate commerce and has authorized you to build it and has thereby gone to the limit of its authority as to a structure which can serve only intra-state commerce, we now take the matter up where the Federal power and duty ends and ours begins and command you to construct that roadway forthwith."

How can this situation be so twisted as to produce the conclusion that the State in *compelling* the appellant to do precisely what Congress has *authorized and permitted* it to do has acted in *conflict* with the right of Congress to prevent obstructions to interstate and foreign commerce?

By what alchemy or *hocus pocus* can perfect harmony be transmuted into conflict?

The obstruction interposed by the commerce clause to the building of this roadway having been completely withdrawn, so that the plaintiff in error, or the State or city if it owned the drawbridge, could construct it forthwith, how is the commerce clause involved at all in determining whether the State may discipline its creature if it does not exercise the right which it has unquestionably acquired?

II

With a few exceptions, the decisions cited in the last preceding section of this brief establishing

that chapter 666 of 1915 does not contravene the constitutional prohibitions against the taking of property, are cases in which the State had exercised its police power by imposing heavy burdens and serious regulations upon railroads engaged primarily in interstate and foreign commerce. Since the Federal control over navigable streams rests wholly upon the same brief sentence in the Constitution from which Congress derives its power over commerce by land routes, all those authorities are in point here. *They may be summed up in the statement that the State's police power extends over the instruments of interstate and foreign commerce precisely as it does over any other activity within its borders, except where it directly conflicts with a definite and positive exercise by the Federal Government of the supreme control which the Constitution confers upon Congress.* The only exceptions to that rule are such exercises of the police power as are intended on their face to construct barriers against interstate commerce or put it at a serious disadvantage in comparison with commerce within the State's borders.

That exactly the same principles apply to navigable waters, and the interstate and foreign commerce thereon, necessarily follows. It is expressly so held in the following among many decisions:

Cummings v. Chicago, 188 U. S. 410;
Lake Shore & M. S. Ry. v. Ohio, 165
 U. S. 365;
Escanaba Company v. Chicago, 107
 U. S. 678;

West Chicago Street L. Co. v. Illinois,
201 U. S. 506;
Canada Atlantic Co. v. Chicago, 210
Fed. 7.

In *Escanaba Company v. Chicago*, supra, the court sustained as not contravening the interstate commerce clause an ordinance of the city of Chicago requiring that drawbridges across the Chicago River within that city should be closed during certain hours in each day, and that they should never be opened for more than ten minutes at a time, and that when opened and closed they should remain closed for at least ten minutes.

When the drawbridges were closed under this ordinance navigation of the river was entirely barred thereby to a vast interstate commerce continuously using it.

The court by Mr. Justice Field, said:

"The Chicago river and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve and improve their free navigation.

"But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people. This power embraces the construction of roads, canals and bridges and the establishment of ferries, and it can generally be exercised more wisely than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in

their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants and the growth of its commerce, and nowhere could the power to control the bridges in that City, their construction, form, and strength and the size of their draws and the manner and times of using them, be better vested than with the State or the authorities of the City upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal Government come in conflict, the latter must control and the former yield."

This case is referred to and approved by many subsequent decisions including *Cummings v. Chicago*, supra, and has never been overruled or limited in any way.

In *Canada Atlantic Transit Co. v. Chicago*, supra, it was held that city ordinances requiring the use of tugs and certain speed in passing through bridges over the same Chicago river was constitutional.

In *West Chicago Street R. Co. v. Illinois*, supra, the court sustained as a valid exercise of the police power an ordinance of the City of Chicago requiring a street railroad company to lower its tunnels under Chicago river, a navigable stream, improved by and under the jurisdiction of the Federal Government, to permit a deepening of the channel on account of the increase in

draft of Great Lakes vessels since the tunnel was authorized and built.

In *Cummings v. Chicago*, *supra*, it was held that even where the Federal Government had acquired title to the bed of a stream, the navigable waters of which extended through two States, and had taken entire charge of improving the channel therein, a city in one of the States had the right to prevent the erection of a dock therein without its permission though a permit therefor had been given by the proper Federal authority invested by Congress with power to do so.

In a most exhaustive and comprehensive review of the whole subject of the exercise by States of their police power in matters affecting interstate commerce by Mr. Justice Hughes, speaking for the Supreme Court, all these earlier cases, in that court, and many more, are considered to deduce the principles which the court enunciates and applies to the regulation by the State of intrastate rates on railroads primarily engaged in interstate and foreign commerce, where the Federal Government had previously taken charge of such railways through the Interstate Commerce Commission.

Minnesota Rate Cases, *supra*.

It is to be noted that the principles enunciated by all of the above decisions, including those referred to in the last section of this brief, go far beyond what an affirmation of the judgment in this case requires. In every instance the State had imposed burdens and regulations upon interstate and foreign commerce in conflict with Federal action or in the absence of a previous approval by Congress of the things required. Here Con-

gress had previously acted and expressly approved and consented to the thing required and the State seeks merely to compel what Congress has so approved."

III

To meet this distressing situation, plaintiff-in-error's counsel is compelled to evolve several wholly new and original theories. The one to which he originally pinned his greatest faith, is this:

That the acquisition by the Federal Government of title to the retaining walls and lands under water, so long as used for a ship canal, created a special and unusual condition of affairs to which normal thinking and general principles established by the decisions do not apply. While it is true that the Federal government being limited to jurisdiction over interstate and foreign commerce could not become vested thereby with the power to *compel* the plaintiff-in-error to build a roadway for intrastate traffic exclusively, the plaintiff-in-error says the State abandoned that power by this conveyance and it simply ceased to exist — except in the general power of the Grand Trunk Railway as its owner.

The mere statement of the proposition condemns it, but we are not left to meet this ghost alone. The exact question was passed upon in:

Cummings v. Chicago, 188 U. S. 410.

Congress going through the identical process followed in the case of Black Rock Harbor, set forth in the evidence introduced by plaintiff-in-

error, with painstaking care, made an appropriation in the following language:

“ Improving Calumet River, Ill: Continuing improvement thirty thousand dollars; of which eleven thousand two hundred and fifty dollars *are to be used between the Forks and one-half mile east of Hammond, Indiana.*

“ — Provided however that no part of said sum nor any sums heretofore appropriated except the said eleven thousand two hundred fifty dollars for the river above the Forks shall be expended until the entire right of way shall have been conveyed to the United States free of expense and the United States shall be fully released from all liability for damages to adjacent property owners to the satisfaction of the secretary of war.”

(Quoted as above in statement of case at p. 4113.)

The required conveyances of the lands under water to the United States were duly made and the new channel was constructed by it.

Though the Calumet river rises in Indiana and the greater part of its course is in that State, its outlet into Lake Michigan is in the city of Chicago in the State of Illinois and the section under consideration in the *Cummings* case was wholly within the limits of that city. The improvements at that point were completed in 1900, and the plaintiff *Cummings*, immediately afterwards, obtained from the Secretary of War a permit to build a wharf out from the uplands owned by him to the harbor line established by that official. On starting work the plaintiff was stopped by the city officials on the ground that the plaintiff had

not obtained also a permit from the city of Chicago as required by its ordinances, and this action was then brought to enjoin that interference by the city.

The court affirmed judgment dismissing the bill, saying:

"The general proposition upon which the plaintiffs base their claim to relief is that the United States by the acts of Congress referred to and by what has been done under those acts has taken 'possession' of Calumet River, and so far as the creation in that river of structures such as bridges, docks, piers and the like is concerned, no jurisdiction or authority whatever remains with the local authorities."

"Did Congress * * * intend by the legislation in question to supersede, for every purpose, the authority of Illinois over the erection of structures in navigable waters wholly within its limits."

"These questions were substantially answered by this Court in *Lake Shore & Michigan Railway v. Ohio*, decided in 1896. That case required a construction of * * * the River and Harbor Act of September 19, 1890. In that case this court said * * * 'The mere delegation to the Secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct when reasonably necessary, its modification so as to remove such impediment does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the Secretary power to that end.' * * * The

mere delegation of power to direct a change in lawful structures . . . cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built.'

"The decision in *Lake Shore & Michigan Railway v. Ohio*, was rendered before the passage of the River and Harbor Act of 1899, but the tenth section of that Act, upon which the permit of the Secretary of War was based, is not so worded as to compel the conclusion that Congress intended by that section to ignore altogether the wishes of Illinois in respect of structures in navigable waters that are wholly within its limits.

"Whether Congress may, against or without the expressed will of a state, give affirmative authority . . . to erect structures in such waters, it is not necessary in this case to decide. It is only necessary to say that the Act of 1899 does not manifest the purpose of Congress to go to that extent . . . The effect of that Act reasonably interpreted, is to make the erection of a structure in a navigable river within the limits of a State dependent upon the concurrent or joint consent of both the National Government and the State government. The Secretary of War . . . may assent to the erection . . . of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must before proceeding under such an authority, obtain also the assent of the State."

The River and Harbor Act of 1899 here considered and construed is the very statute on which the plaintiff-in-error "lies — there has been no change in the law since that time.

It will be noticed that the *Cummings* case goes much further than the facts in this case require. *There the question was whether the local authorities could interfere and prevent the enjoyment of a license from the Federal Government to build a wharf in an interstate stream improved by the Federal Government and the bed of which was owned by it. Here the State seeks only to compel the exercise by plaintiff-in-error of the privilege granted it by the Federal Government.*

The attempt of appellant's counsel to distinguish the decision in the *Cummings* case from the case at bar, on the ground that Calumet river is wholly in the State of Illinois, is quite as careless as the enunciation of its preposterous theory in ignorance of that decision. For as shown by the very statement of facts in the *Cummings* case, the Act in question provided for the improvement of that river to a point in the State of Indiana "*one-half mile east of Hammond, Indiana.*" So the navigable waters of the Calumet River must have extended at least that far into Indiana. A reference to any map of Illinois and Indiana will show that the Calumet river rises and runs for most of its course in the latter State, only a short section at the outlet being in Illinois.

Century Encyclopedia, Vol. X, Map of
Illinois and Indiana.

Moreover, it could not make any possible difference in the force of this decision on the point that the acquisition by the Federal Government of the bed of a stream does not affect the State's police

power over that stream, whether it was wholly within the State or not.

The emphasis which the plaintiff-in-error has given to this detail merely serves the purpose of showing the absolute completeness of the parallel, assuming that what has been, for nearly a century, an artificial basin, wholly within the State and under its undisputed ownership and control, with a water level four feet above the Niagara river, is really a part of a navigable stream, not wholly within that State.

IV

The plaintiff-in-error's other reason why the situation here does not permit of normal reasoning, is that the termini of the bridge being on the mainland of Canada and on the mainland of New York, and its sole business up to date having been to provide railroad facilities between those two points, its sacred dedication to foreign commerce cannot be "burdened" now by intrastate business. A wholly sufficient answer to that sophistry lies in its express covenant, contained in the deeds (put in evidence by the plaintiff-in-error) of the strip of land across Squaw Island on which one-third of its whole structure rests, to provide such service for the owners of that Island not only for ultimate use but for its improvement. If this were a "burden," it is part of the original cost of the bridge itself, and essentially reduced instead of increasing the "burden" which interstate commerce must bear. And it is a prior and superior obligation to any incurred to interstate or foreign commerce and to its obligation to earn

for the Grank Trunk Railway 23 per cent per annum. Another completely adequate answer, is that the evidence and findings in this record establish that plaintiff-in-error's theoretical "burden" has no actual existence whatever, so far as interstate and foreign commerce are concerned.

The only conceivable "burden" falls on the Grank Trunk Railroad in that its additional fifteen thousand dollars (\$15,000.00) investment may, theoretically, earn only 6 per cent per annum, whereas its present investment of one million five hundred thousand dollars (\$1,500,000.00) earns 23 per cent per annum.

POINT FOURTH

THE ENTIRE ARGUMENT OF THE PLAINTIFF-IN-ERROR AS DEVELOPED IN ITS BRIEF, IS AN ATTEMPT TO BRING THE ISSUES IN THIS CASE WITHIN THE PURVIEW OF LEGAL PRINCIPLES WHICH HAVE NO BEARING UPON THE FACTS THIS RECORD DISCLOSES.

I.

Under their first point the learned counsel for plaintiff-in-error call attention to many decisions to establish the general proposition that a state may not take away a franchise granted by it or impose burdens not included in the terms of the original franchise even where the right to alter, amend or repeal was expressly reserved. Assuming this general rule to be still in full force, it is subject to many limitations and exceptions where the rule comes in conflict with the exercise of the State's legitimate police power which must dominate or government would utterly fail,

through the multiplicity of exemptions so created by innumerable franchises. These limitations and exceptions are based on the sound theory that all grants of franchises are subject to the reasonable exercise of the police power both by necessary implication and also because the legislature has no power to divest the sovereignty of that attribute.

Hence the many instances to which we have called attention (Point Second) where the imposition of great burdens upon corporations has been sustained, as in aid of the public interest, and our contention that the present case clearly belongs in that class.

Moreover, their exhaustive argument is beside the case because, as we have urged upon the attention of this court, no franchise is taken away and no burden is imposed within the meaning of the decisions cited by counsel for the plaintiff-in-error. The only franchise granted was to build a bridge *for railroad cars and for vehicles and foot passengers*—neither right has been prohibited or affected by the Act in question. And the cost of the required improvement being insignificant in proportion to the capital and earnings of the plaintiff-in-error, it being for the public interest, and there being no evidence that it would not produce an adequate return on the investment required, no burden was imposed.

And finally, whether, as the Court of Appeals has decided and we contend, the consolidation act substituted the word *shall* for the word *may* as to building a roadway on the bridge, or the grant of the franchise is permissive both as to railroad and as to roadway, the obligation to exercise the

franchise completely, when accepted, is one which the State had a right to enforce as it did by the Act of 1915 — in either view the obligation imposed is not even one of those insignificant burdens which courts characterize as not burdens in law though confessedly such in fact.

(2) The ingenious and laborious effort to show that this court is bound to follow the Canadian decision in interpreting the word *shall* to mean *may*, is wholly wasted because the Canadian court did not so decide as we have clearly established and also because no court has power to interpret *shall* to mean *may*.

(3) The argument that the Consolidation Act caused no change in the situation — that the corporation and the bridge both remained two distinct entities, each ending abruptly in the middle of the river — is an impracticable absurdity. The whole object of the Consolidation Act was to create one corporation with all the rights and all the duties of both its predecessors and one bridge based on and controlled by one law.

(4) The contention that giving service to Squaw Island is an imposition upon the corporation and a burden on interstate and foreign commerce, is utterly insincere. The New York Legislature does not forbid the completion of the roadway to Canada if the plaintiff-in-error so elects. The plaintiff-in-error paid for its valuable right of way by a grant of the right to connect with and use the rails and roadway on the bridge — the "burden" was voluntarily assumed, pre-dates the bridge and resulted in a great saving instead of a burden to both the plaintiff-in-error and

interstate and foreign commerce — supposing the benefit is ever given to the public instead of to the Grand Trunk Railway. There is nothing in the franchise which forbids the plaintiff to make this agreement and give such service to intermediate points. And the plaintiff-in-error surely cannot be allowed to say that the agreement by which it obtained the right of way on which 1,200 feet of its structure rests was invalid, while it retains and uses that right of way. While the plaintiff-in-error and its owner the Grand Trunk Railway may be willing to take advantage, if it can, of such an obvious fraud, the government and people of the United States should not be made a party thereto through an obviously hypocritical plea, in their name, for the sole benefit of this corporation.

(5) As to the change in tolls, there is nothing in the evidence to show that those provided in the Act of 1915 are not sufficient to furnish an adequate return on the investment required and the trial court so found. The burden was on the plaintiff-in-error to produce such evidence as a condition of being allowed to be heard on that phase of the matter.

Minnesota Rate Cases, supra.

The attempt to do that now as a mere matter of scholastic argument based on the provision for tolls in the original act cannot be listened to. Moreover, it is obviously weak, specious and wholly unconvincing. For the old tolls were for passage across the entire bridge a distance of some 3,500 feet while these tolls apply to passing

over only 435 thereof; and the small use of the bridge in the early days, while the population at each end was small, naturally justified much larger tolls than the vast volume of traffic which is strikingly illustrated by the fact that the growth in traffic by rail has made the tolls fixed at the same time for railroad cars enormously profitable — 23% net per annum notwithstanding the increased cost of materials and labor to which counsel so earnestly refers.

(6) The plea in behalf of the bridge company bondholders is amusing in the light of the undisputed evidence. There is a margin in annual net profits of something over three hundred thousand dollars (\$300,000.00) after every conceivable charge for maintenance and depreciation, the payment of interest on the seven hundred thousand dollars (\$700,000.00) in bonds, the building of this roadway out of one year's profits and provision for its annual maintenance, if there were no income whatever derived from that roadway — enough to take up the entire principal of the bonds in two and one-half years. Suggesting that bondholders' rights are injured is pure hypocrisy. Also, one of the chief assets in securing bonds is the right of way across Squaw Island, the contract for which, providing access and use of the bridge as the consideration, antedates the bonds and was a chief inducement for the purchase thereof. Do the bondholders also wish to take part in the attempted fraud, especially where no possible gain to them can accrue? If so, it must be solely because the bonds are all owned by the Grand Trunk Railway, which also owns all the stock.

II.

As to plaintiff-in-error's second point, we desire to observe:

- (a) That the question has been discussed already in considering its first point.
- (b) That the question is not an issue before this court, since there is no evidence in the case tending to show these tolls would not produce an adequate return upon the investment, and the trial court so found.

III.

As to the third point in the brief of plaintiff-in-error, we wish to point out:

Neither the trial court nor the Appellate Division nor the Court of Appeals committed the error which counsel so violently attacks.

The only use made of the assets and earnings of the plaintiff-in-error was to establish, as was done overwhelmingly, that the cost of this improvement was insignificant in proportion to the assets and annual net earnings of the corporation — the most important elements in the consideration and determination of this case.

IV.

As to Points IV, V, VI and VII of the brief for plaintiff-in-error, we would point out:

- (a) Action by the State in opposition to the Federal Government, or even independently thereof, is not an issue in this case.

The State required that this roadway be built only after the Federal Government had authorized the plaintiff-in-error to construct it.

The Federal Government's powers were com-

pletely exercised and exhausted when it told the plaintiff-in-error it might build this intrastate roadway.

The action of the State in ordering it built, in accordance with Federal permission already granted, cannot be construed by any stretch of the imagination into an invasion by the State upon Federal prerogatives — there can be no conflict of authority where both governments agree and are acting in perfect harmony.

(b) Admitting for the sake of argument that the Federal Government may assume absolute and exclusive jurisdiction over the instrumentalities of interstate and foreign commerce, whether navigable streams or railroads and bridges, and that thereupon the jurisdiction of the State over those instrumentalities, the lands used therein and the powers and corporations operating or using those instrumentalities or entering upon such lands would entirely cease, and they would be utterly freed from the exercise of the State's police power or any other exercise of its sovereignty, the fact remains that the Federal Government has not assumed such jurisdiction either generally or in this particular case.

We have covered this question so fully and conclusively under our Point Third that further discussion here would be mere useless repetition. We wish merely to point out that the exhaustive argument of the plaintiff-in-error tends only to establish what the Federal Government *might* have done or *might* do, and therefore has no application to the present case.

(c) The grant by the State to the Federal Gov



DEC 8 1919

JAMES D. MANER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1919

No. [REDACTED]

46

INTERNATIONAL BRIDGE COMPANY

PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF
NEW YORK,

DEFENDANT IN ERROR.

REPLY BRIEF FOR PLAINTIFF IN ERROR

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Plaintiff in Error.

ADELBERT MOOT,
Of Counsel.

Supreme Court of the United States

INTERNATIONAL BRIDGE COMPANY,

Plaintiff in Error,

AGAINST

PEOPLE OF THE STATE OF NEW YORK,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR

I.

As we read the brief for the State of New York, or its creatures the corporations owning Squaw Island, we are moved to ask why that brief neither discusses, nor really attempts to answer, one of the main questions in this case. As we see it that question is whether the State of New York can now forcibly change the east end of an international bridge that is about half a century old and has never carried a ton of freight that was not international freight, and now make it into an intrastate bridge that is to carry at least 100,000 tons of sand and gravel annually for the Squaw Island Corporations alone, and that may have to carry, it is suggested, two or three times that amount?

Nor is this all. Why does not counsel at least mention the Act of Congress of June 23, 1874, by which "modification in the plans of the bridge

authorized on the 30th day of June, 1870 * * * are hereby approved and said bridge as constructed is declared to be a lawful structure?" Probably that important statute is not mentioned because it is thought that like silence in the Court of Appeals caused that court to overlook that statute and decide this case in favor of counsel's clients. But that statute is in effect an amendment to all state and Canadian statutes as well as to the Act of Congress that had gone before.

It is true those statutes authorized the Bridge Company to build a bridge "as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains," but when the bridge was built for railroad trains only, and then the only power that could and did give a valid franchise to build the bridge across the Niagara from Buffalo to Canada, said "the modification in your plans" is "approved," and your bridge is a "lawful structure,"—what is left of any argument rested upon the language quoted from the earlier statutes about a bridge for "persons on foot and in carriages" on their way from Canada to Buffalo, or Buffalo to Canada? Mark, it was never to be a mere Squaw Island bridge. What power had the legislature of New York, in 1915, to amend the Act of Congress of June 23, 1874? And is not Chapter 666 of the Laws of New York for 1915 in effect an amendment to the Act of Congress of June 23, 1874?

This is the first case we can find involving a bridge across a river that is an international boundary. What power, aside from the national power, has any right whatever to say such a river may be bridged, or upon what terms, or whether such a bridge shall be one for persons and carriages, or

railroad trains, or both? Is the case of a river that is an international boundary at all comparable to one involving building a dock, or bridge, wholly within a state, even if the river runs through two or more states. Does not the necessarily exclusive jurisdiction of the National government render all attempts of any governmental agency of New York, executive, legislative or judicial, to require an international bridge to be so altered as to change one end of it into a domestic bridge, *ultra vires*?

II.

The covenants in deeds granting right of way across Squaw Island have no bearing on this case.

It is claimed that the Bridge Company is obligated to give access to Squaw Island by a clause in the deeds by which it acquired its right of way across the Island. Upon examination of these deeds, executed in 1871 and 1874 respectively (Exhibits 7 and 8), it will be seen at once that they give to the grantor only "the right *in common with the public at large* to use the bridge * * * upon paying therefor the tolls and charges allowed by law" (*i. e.* the tolls fixed by the Act of Incorporation in 1857 and approved by Congress in the Act of 1870, and set out on page 35 of our brief), and permit the grantor to make the necessary rail and other connections *at its own expense* in such a manner "as shall not interfere with the regular business of such bridge."

These deeds may confer upon the owners of Squaw Island the right to connect at their own expense with the tracks across the bridge, assuming that the Bridge Company had power to grant such

right in view of the fact that its franchise did not authorize it to construct and maintain a bridge from Buffalo to Squaw Island, nor a bridge from Canada to Squaw Island, and provided that the United States Government will permit such a connection, and assume the burden of maintaining a customs house and immigration office on Squaw Island.

If at some future time a roadway and footpath shall be constructed across the bridge to Canada, it may be that the owners of the Island will also have the right to connect therewith at their own expense subject to the same conditions. But it is evident that these clauses confer no special and peculiar right on the owners of the Island to require the construction of such roadway and footpath at the expense of the Bridge Company for the exclusive benefit of their property. The Bridge Company did not covenant to alter its bridge or to build a roadway for the benefit of Squaw Island, as it is required to do by Chapter 666 of the Laws of 1915, and the deeds have no bearing upon the present controversy, *otherwise the act in question was unnecessary.*

The second of these deeds (Exhibit 8) from the same grantor, and containing the covenant relied on by counsel, was executed on August 6, 1874, which was after the bridge had been completed as a railroad bridge only, and after it had been declared by Congress to be a lawful structure *as constructed* (Act of June 23, 1874, Chapter 475). So counsel's argument that a roadway to Squaw Island was the consideration for the Bridge Company's right of way fades into nothingness. There is no question of good faith involved. The Bridge Company did not undertake to "provide service" for

Squaw Island, but merely to permit the owners of the Island to make connection with its bridge at their own expense and use it on the same terms as "the public at large." As the public at large has never been permitted to use the bridge for pedestrian or vehicular traffic, the owners of Squaw Island have no right to do so. As the owners of Squaw Island have never connected with the tracks at their own expense, the covenant has never gone into operation. If they should make such connection in the future, and the Bridge Company should exclude them from its tracks, their remedy, if any, would be an action on the covenant for damages—not an Act of the Legislature prescribing penalties.

III.

The brief of the defendant in error is misleading in its references to the earnings of the Bridge Company.

Counsel lays great stress on the supposed enormous earnings of the International Bridge Company, and assumes that such earnings are available for distribution to stockholders. The fact is that the surplus earnings of the Bridge Company constitute a depreciation reserve, which is essential to provide for the periodical rebuilding of the bridge necessitated from time to time by increased traffic, and which may be required at any time by the Secretary of War. The bridge was completely rebuilt to accommodate increased traffic in 1899, twenty-five years after its original construction. Twenty years have now elapsed since that time, so it is reasonable to presume that it must again be rebuilt in the near

future. In addition the Black Rock Harbor draw was renewed a second time, in 1907, at the command of the Secretary of War.

IV.

The judgment cannot be sustained on the basis of the Trial Court's refusals to find.

Counsel claims in his brief (pages 21, 28, etc.), that the refusal of the Trial Court to find as requested by plaintiff in error amounts to a finding by the Court in favor of the contention of the defendant in error, although no such finding was made by the court, and attempts to justify the decision on the basis of such non-existent findings.

Counsel is in error as to the rule. Under the New York practice a refusal to find as requested is not equivalent to an affirmative finding to the contrary. Judgment must be based on facts found, not facts refused.

Morehouse vs. Brooklyn Heights R. R. Co.,
185 N. Y., 520, 527.

Galle vs. Tode, 148 N. Y., 270, 277.

Meyer vs. Amidon, 45 N. Y., 169, 171.

V.

The Federal Government has never authorized plaintiff in error to construct a bridge to Squaw Island, and has never determined that such a bridge would not interfere with foreign and interstate commerce.

The statements in this respect found on pages 67 and 84 of the brief for defendant in error are misleading. Presumably these loose statements refer to the approval of plans for the reconstruction of the Black Rock Harbor draw by the Secretary of War. These plans show in dotted lines "Provision for future roadway," followed by the explanation, "Roadway shown in dotted lines not to be put in at present, but provision is made in the design of the bridge for its future construction." *No provision was made in these plans for access to Squaw Island,* and the structure was completed without the roadway as indicated by the note upon the plans, and was accepted by the Secretary of War. (Findings XIV and XV, pages 61 and 62.)

When these plans were prepared it was thought that at some future time a roadway might be constructed across the bridge from Buffalo to Canada, and the plans for the Black Rock Harbor draw were made so that such a roadway might be attached without requiring the rebuilding of that portion of the structure.

In view of the note stating that the roadway was not to be put in at that time, it is doubtful whether the Secretary of War was required to approve the roadway feature even in relation to the possible obstruction of navigation. Certainly the approval had no effect beyond this. The Secretary of War was not called upon to consider the effect upon commerce passing over the bridge.

This court has said in a case quoted in our opponent's brief:

"The mere delegation to the Secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably neces-

sary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the Secretary power to that end."

Lake Shore & Michigan Ry. vs. Ohio, 165 U. S., 365, 368.

This decision leaves the power to authorize bridges over waterways wholly within a single state in the State Government, and the power to authorize bridges over interstate and international streams, such as the Niagara River, in Congress.

Luxton vs. North River Bridge Co., 153 U. S., 532.

Mr. Kellogg, the special counsel for the state, who drew the brief in this case, manifests a certain obsession in regard to Squaw Island. He has been for many years counsel for the persons interested in Squaw Island in all their numerous corporate disguises, is himself personally interested in the development project, and was the chief witness for the state upon the trial of this action. How far his zeal has carried him beyond the prosaic realm of fact and reason, as well as the visionary character of the various Squaw Island development projects is abundantly illustrated in his brief.

Thus we are told that the development of Squaw Island as a lake, rail and barge canal terminal, and "the instant conversion of 124 acres of primeval waste into desirable terminal and factory property in the heart of one of the greatest ports, railroad centers and manufacturing districts in the world,"

etc., etc., awaits only the construction of this roadway (brief, pages 20, 58, 59), and we are told earlier in the brief that a roadway twelve feet wide, costing but little over \$10,000.00, will be entirely adequate for these extensive purposes, and will fulfil all requirements of the statute (Brief, pages 15 to 17), although the state's engineer witness admitted that such a roadway would not permit the passage of two automobile trucks without overhanging the footpaths to such an extent as to risk pushing pedestrians off the bridge. (Record, page 162.)

Again counsel assures us that Squaw Island is to be used for this great lake and rail terminal with extensive deep water wharves and numerous factory sites, and in the next breath, and without a smile, tells us that the island is to be excavated, and the sand and gravel of which it is composed is to be removed and carried across this twelve-foot roadway to be used for building materials in the City of Buffalo (Brief, pages 26, 27, 58 and 60).

Of course, this case does not turn upon the apparent interest of the Squaw Island corporations in it, but the beautiful camouflage thrown up by the witness-counsel to screen his clients in this litigation, and written into the statute in question is really amusing. The whole argument of counsel shows the statute fits these clients like a glove, but how the statute came to fit them so well, unless it was made to order by some lawyer for that purpose, does not appear. No! The owners of Squaw Island had nothing to do with this legislation, except that "the owners of Squaw Island were called in (by whom? why?) to present to the Legislature the real facts" (Counsel's brief, page 65) and the result, of course, was the act in question and this action. And so we had the testimony of counsel showing his clients and their ten-

ants were alone interested in Squaw Island, and are really the "People" here in this litigation (Record, 134 to 159). Outside his own clients, counsel cannot spy a business man, or even one lone fisherman, interested in this case.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Plaintiff-in-Error,

Office and P. O. Address,
302 Erie County Bank Bldg.,
Buffalo, N. Y.

ADELBERT MOOT,
HENRY W. SPRAGUE,
WILLIAM L. MARCY,
HELEN Z. M. RODGERS,
of Counsel.



**INTERNATIONAL BRIDGE COMPANY v. PEOPLE
OF THE STATE OF NEW YORK.****ERROR TO THE SUPREME COURT OF THE STATE OF NEW
YORK.**

No. 46. Argued December 16, 1919; restored to docket for reargument January 26, 1920; reargued October 11, 12, 1920.—Decided November 22, 1920.

1. In an action to recover penalties from a bridge company for failure to build foot and carriage ways upon its railway bridge as required by an act amending its charter, it is premature to inquire whether a distinct and independent provision, reducing the tolls chargeable for vehicles and pedestrians below the limits fixed in the charter, impairs the obligation of the charter contract, since the invalidity of the toll reductions would not affect the requirement to build the additions. *P. 130.*
2. Under acts of New York and Canada consolidating a New York with a like Canadian corporation, the new company constructed a bridge over the Niagara River for railroad uses only. The original charters provided for constructing foot and carriage ways also, that of New York in permissive but that of Canada in mandatory language, and the acts of consolidation bound the new company to all the duties of each of its constituents. *Held:* (1) That the new company had no charter contract immunity from being required to add the foot and carriage ways in New York under power reserved by the State to amend the charter, and that such requirement was not inconsistent with the contract clause of the Constitution; nor, in the absence of anything to show that the additions would not yield a reasonable return, could it be held to violate the Fourteenth Amendment. *Id.*
3. The Act of June 30, 1870, c. 176, 16 Stat. 173, in recognizing as a lawful structure any bridge constructed across the Niagara River in pursuance of New York Laws, 1857, c. 753, and amendments (Laws 1869, c. 550), subject to the supervision of the Secretary of War and his approval of the plans, recognized that the existence of the bridge company and its right to build on New York land came from New York; and the facts that the bridge when built, as a railroad bridge

only, was devoted wholly to international commerce and that Congress by the Act of June 23, 1874, c. 475, 18 Stat. 275, declared it a lawful structure and an established post route for mail of the United States, did not supplant the authority of the State to require the company to equip the bridge with ways for foot passengers and vehicles as contemplated by its charter. P. 131.

4. The Act of 1874, *supra*, by declaring the bridge lawful as built, did not repeal the authority given by the Act of 1870, *supra*, to build subject to the approval of the Secretary of War, and the fact that this bridge was twice rebuilt without foot and carriage ways with the Secretary's consent, but under plans approved by him and providing for such additions in future, supports rather than negatives the view that the power of the State to require them was contemplated throughout and that Congress did not seek to divest it. *Id.*
5. The mere fact that a bridge is international, crossing an international stream, does not of itself divest the State of power over its part of the structure, in the silence of Congress. P. 133.
6. The Act of March 3, 1899, § 9, c. 425, 30 Stat. 1151, in requiring the assent of Congress to the erection of bridges over navigable waters not wholly within a State, does not make Congress the source of the right to build but assumes that the right comes from the State. *Id.*
7. The conveyance of a part of the land under the bridge to the United States for a public purpose not connected with the administration of the Government did not affect the authority of New York over the residue within the State, and taken in connection with the acts of the Government before and after the grant does not invalidate, even in part, the New York act requiring the additional construction. P. 134.

223 N. Y. 137, affirmed.

THE case is stated in the opinion.

Mr. Adelbert Moot and *Mrs. Helen Z. M. Rodgers*, with whom *Mr. Henry W. Sprague* and *Mr. William L. Marcy* were on the briefs, for plaintiff in error.

Mr. James S. Y. Ivins, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, *Mr. Ralph A. Kellogg* and *Mr. E. C. Aiken* were on the briefs, for defendant in error.

Opinion of the Court.

254 U. S.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit brought by the State of New York to recover penalties from the Bridge Company for failure to place upon its bridge a roadway for vehicles and a pathway for pedestrians between Squaw Island in Niagara River and the mainland of New York State as required by c. 666 of the Laws of 1915 of the State of New York. The defendant set up that the act was contrary to the Constitution of the United States in specified respects, but the plaintiff got judgment in the Supreme Court, which was affirmed by the Court of Appeals. 223 N. Y. 137.

The Bridge Company originally was incorporated by a special charter from the State of New York. Laws of 1857, c. 753. As the bridge was to cross the Niagara River from Buffalo to Canada, a similar corporation was created under the laws of Canada, 20 Vict. c. 227, and subsequently the two corporations were consolidated, pursuant to Laws of New York, 1869, c. 550, and a Canadian Act, 32 and 33 Vict. c. 65, subject to all the duties of each of the consolidated companies. By the Act of Congress of June 30, 1870, c. 176, 16 Stat. 173, any bridge constructed across the Niagara River in pursuance of the New York Act of 1857 and any acts of the New York legislature then in force amending the same was authorized as a lawful structure subject to the supervision of the Secretary of War and his approval of the plans. By the New York Act of 1857, "Said bridge may be constructed as well for the passage of persons on foot and in carriages and otherwise as for the passage of railroad trains," § 15. And "whenever the said bridge shall be complete for the passage of ordinary teams and carriages" the company may erect toll gates and charge tolls not exceeding certain rates for foot passengers, carriages, &c. The original Canadian Act had words similar to those just quoted from

§ 15, except that it said "shall be constructed" instead of "may be," a fact to which we shall advert again.

Between 1870 and 1874 the bridge was built as required by the charter with one draw across Black Rock Harbor and one across the main channel of the river. It crossed Squaw Island on a trestle, afterwards filled in, but was built as a railroad bridge exclusively without any provision for footpaths or roadways. By the Act of Congress of June 23, 1874, c. 475, 18 Stat. 275, it was declared a lawful structure and an established post route for the mail of the United States. In the year 1899 a plan for rebuilding the bridge with wings for roadways and footpaths was approved by the Secretary of War subject to changes at the expense of the Company if the Secretary should deem them advisable. The rebuilding took place in 1899-1901, but omitted the wings, and this modification was assented to by the Secretary of War.

The Niagara River is navigable at this point. In pursuance of plans for improvement adopted by the United States, in 1906 it acquired from the State of New York the land under Black Rock Harbor, lying on the New York side of Squaw Island, and the adjacent portions of the Erie Canal, both being within the limits of the State and crossed by the bridge. Thereafter the improvements were carried out.

In 1907 the Secretary of War gave notice to the Company that the bridge over Black Rock Harbor and Erie Canal obstructed navigation and that changes were required. The Company submitted plans again showing in dotted lines wings for roadways and footpaths, noting that they were not to be put in at present but that provision was made in the design for their future construction. The plans were approved and the bridge was built without the wings, the completion being reported by his resident representative to the Secretary of War.

By c. 666 of the laws of New York for 1915, the charter

Opinion of the Court.

254 U. S.

of the Company was amended so as to require the construction of a roadway for vehicles and a pathway for pedestrians upon the draw across Black Rock Harbor, the Company being allowed to charge tolls not exceeding specified sums. The Company failed to comply with the requirement and the time limit had expired before this suit was brought to recover penalties imposed by the act. It is found that the construction was necessary for the public interest and convenience; that the cost of the changes is insignificant in comparison with the assets and net earnings of the Company, and that it does not appear that the investment would not yield a reasonable return.

The first objections to the new requirement made by the State are that it impairs the obligation of the contract in the original charter and takes the Company's property without due process of law. The argument is based partly upon a reduction of the tolls from those mentioned in the charter of 1857, made by the Act of 1915. Concerning this it is enough to say that the objection is premature. The clause relating to the construction of the roadway and pathway is distinct from and independent of that which fixes the maximum rates to be charged. The latter might be invalid and the former good. If the rates are too low they can be changed at any time. The only question now before us is whether the additions shall be built. As to that it would be going very far in the way of limiting the reserved right to amend such charters, if it should be held that the State had not power to require what originally was contemplated in permissive words as part of the scheme. But however that might be, the New York Act authorizing consolidation subjected this consolidated corporation to the duties of the Canadian as well as of the New York charter, and the Canadian Act made the arrangement for foot passengers and carriages a duty. The words that we have quoted plainly impose one. The

opinion in *Attorney-General v. International Bridge Co.*, 6 Ont. App. 537, 543, implies that they do so by speaking of the abandonment of a portion of the work as probably an abuse of the Act of Parliament, and the same is clearly stated in *Canada Southern Ry. Co. v. International Bridge Co.*, 8 App. Cases, 723, 729.

It is argued that, the Canadian Act governing only the Canadian side, its adoption by New York carried the obligation no farther. But it appears to us that it would be quibbling with the rational understanding of the duty assumed to say that the Company could have supposed that it had a contract or property right to confine its building of the footpath and carriage-way to the Canada side of the boundary line.

The New York legislature of course confined its command to the half of the bridge within its jurisdiction. It may be presumed that if that command is obeyed either Canada or the Company will see the propriety of carrying the way and path across to the other shore. At all events the power of New York to insist upon its rights is not limited by speculation upon that point. As we agree with the Court of Appeals that this amendment to the charter was within the power reserved to the State the objection under the contract clause of the Constitution of course must fail, and, it would seem, that under the Fourteenth Amendment also. But as to the latter we may add, as the Court of Appeals added, that there is nothing to show that the addition to the structure will not yield a reasonable return; if that be essential in view of the charter. *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262. *Chesapeake & Ohio Ry. Co. v. Public Service Commission*, 242 U. S. 603.

The only argument that impresses us and the one that was most pressed is that this is an international bridge, and that Congress has assumed such control of it as to exclude any intermeddling by the State. It is said that

Opinion of the Court.

254 U. S.

the bridge as constructed was and is devoted wholly to international commerce and that when Congress authorized it in that form in 1874 that authority must be regarded as the charter under which it was maintained. Without repeating the considerations urged in support of this conclusion we will state the reasons that prevail with us.—The part of the structure with which we are concerned is within the territorial jurisdiction of the State of New York. There was no exercise of the power of eminent domain by the United States. The State was the source of every title to that land and, apart from the special purposes to which it might be destined, of every right to use it. Any structure upon it considered merely as a structure is erected by the authority of New York. The nature and qualifications of ownership are decided by the State and although certain supervening uses consistent with those qualifications cannot be interfered with by the State, still the foundation of a right to use the land at all must be laid by state law. Not only the existence of the Company but its right to build upon New York land came from New York, as was recognized by the form of the original Act of Congress of 1870, which speaks of any bridge built "in pursuance of" the New York statutes. It did not, as perhaps the New York Consolidation Act did, refer to those statutes simply as documents and incorporate them, it referred to them as the source of the Company's power.

From an early date the State has been recognized as the source of authority in the absence of action by Congress. *Willson v. Black-Bird Creek Marsh Co.*, 2 Pet. 245. *Escanaba Co. v. Chicago*, 107 U. S. 678. And this Court has been slow to interpret such action as intended to exclude the source of rights from all power in the premises. In a case of navigable waters wholly within a State, over which a right of way had been conveyed to the United States and which the United States was spending con-

siderable sums to improve, it was held that, whether or not Congress had power to authorize private persons to build in such waters without the consent of the State, an act making comprehensive regulations of work within them did not manifest a purpose to exclude the previously existing authority of the State over such work. *Cummings v. Chicago*, 188 U. S. 410, 413, 428, *et seq.*

But it is said that a different rule applies to an international stream and that Congress has recognized the distinction by the Act of March 3, 1899, c. 425, § 9, 30 Stat. 1151. It is true that that statute makes a distinction, but the distinction is that bridges may be built across navigable waters wholly within the State if approved by the Chief of Engineers and the Secretary of War, but, with regard to waters not wholly within the State, only after the consent of Congress has been obtained. The act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State. It merely subjects the right supposed to have been obtained from there to the further condition of getting from Congress consent to action upon the grant.

No doubt in the case of an international bridge the action of a State will be scrutinized in order to avoid any possible ground for international complaint, but the mere fact that the bridge was of that nature would not of itself take away the power of the State over its part of the structure if Congress were silent, any more than the fact that it was a passageway for interstate commerce or crossed a navigable stream. When Congress has acted we see no reason for not leaving the situation as Congress has seemed to leave it, if on the most critical examination we discover no intent to withdraw state control, but on the contrary an assumption that the control is to remain. We have adverted to the implications of the general law of 1899 and have mentioned the statutes that deal specifically with

Dissent.

254 U. S.

this bridge. The Act of 1874 declaring the existing bridge lawful was a confirmation which it was natural to seek but was not a repeal of the authority given to the Company in 1870 to build subject to the approval of the Secretary of War. The superstructure has been rebuilt since 1874 and the Secretary of War twice has approved plans showing the carriage and footways. It is true that the Company never has sought to execute that part of the plan, but on the facts that we have stated it appears to us a strange contention that it has contract or property rights not to be required to build the bridge or that Congress by implication has forbidden the State to demand that the plan recognized by everyone from the beginning should at last be carried out.

The conveyance of a part of the land under the bridge to the United States for a public purpose not connected with the administration of the Government did not affect the authority of New York over the residue within the State, and taken in connection with the acts of the Government before and after the grant does not invalidate the statute of 1915 even in part. See *Cummings v. Chicago*, 188 U. S. 410, 413. *Fort Leavenworth R. R. Co. v. Loue*, 114 U. S. 525. *Omaechavarria v. Idaho*, 246 U. S. 343, 346.

Judgment affirmed.

THE CHIEF JUSTICE, MR. JUSTICE MCKENNA and MR. JUSTICE McREYNOLDS, dissent.